IN THE SUPREME COURT OF MISSOURI

L.A.C., a minor, by and through her Next Friend, Dina Cannon,	)	
Plaintiff-Appellant,	)	
v.	)	**No. SC 83718**
WARD PARKWAY SHOPPING CENTER COMPANY, L.P., W.S.C. ASSOCIATES, L.P., IPC INTER-NATIONAL CORPORATION, and G.G. MANAGEMENT COMPANY, INC.,	)	
Defendants-Respondents.	)	

On Transfer from the Missouri Court of Appeals, Western District
Case No. WD 58111
Spinden, C.J., and Ulrich and Smith, JJ

APPELLANT'S SUBSTITUTE MAIN BRIEF

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Jurisdictional Statement

This action involves a direct appeal from a final order entered by the Circuit Court of Jackson County, Sixteenth Judicial Circuit, Division 15, in which the Court granted the motions for summary judgment filed by defendants Ward Parkway Shopping Center Company, L.P., W.S.C. Associates, L.P., and G.G. Management Company, Inc.; granted the motion for judgment on the pleadings filed by defendant IPC International Corporation; and entered judgment in favor of all defendants. The Missouri Court of Appeals, Western District, reversed each of those rulings, and the case was ordered transferred to this Court. Jurisdiction is therefore proper in this Court under Mo. Const. art. V, §§ 2, 3 and 10, and R.S.Mo. § 512.020.

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Summary of the Case

Plaintiff L.A.C. is a minor. On March 15, 1997, when she was twelve years old, she visited the Ward Parkway Mall located in Kansas City, Missouri. During her visit she was assaulted by a young man, abducted to another area of the Mall, and subjected to a brutal and violent rape. As a result she filed the present case. Her petition asserts claims for negligence and breach of contract. Her negligence claim against the defendants who own and manage the Ward Parkway Mall charges that these defendants knew of a pattern of violent crime at the Mall but failed to take appropriate steps to correct the problem. Her negligence claim against the company hired to provide security at the Mall charges that this defendant undertook a duty to exercise reasonable care to protect the Mall's patrons but failed to do so. Finally, plaintiff's breach of contract claim charges that same security company defendant with failing to provide the security services that it had promised in its security contract with the Mall's owners and managers.

The Circuit Court granted summary judgment to the defendants who own and manage the Mall, holding that these defendants owed no duty to plaintiff. The Circuit Court also granted judgment on the pleadings to the defendant security company, holding that the company had not assumed a duty to plaintiff, and that she was not a third party beneficiary to its security contract. The Court of Appeals, applying clearly established Missouri law, reversed these rulings. The Court of Appeals was correct in doing so, for the following reasons.

1. This Court has held that business owners owe a duty to protect their customers from criminal attacks if they knew or should have known of prior violent crimes

occurring on their premises. Madden v. C & K Barbecue Carryout, Inc., 758 S.W.2d 59, 62 (Mo. banc 1988); Decker v. Gramex Corp., 758 S.W.2d 59, 62 (Mo. banc 1988). In support of her negligence claim against the owners and managers of the Ward Parkway Mall, plaintiff produced the defendants' own incident reports showing that at least 37 violent crimes were reported at the Mall in just the 25 months prior to her rape. Defendants could therefore foresee criminal attacks on their patrons, and they had a duty to take reasonable steps to protect those patrons.

2. It is well settled in Missouri that tort liability may be predicated on the breach of a duty assumed by contract. Westerhold v. Carroll, 419 S.W.2d 73, 80 (Mo. 1967). In support of her negligence claim against defendant IPC, the company hired to provide security at the Mall, plaintiff produced evidence showing that IPC had agreed by contract to provide specific security services at the Mall, and knew or should have known that injury to third persons such as plaintiff would likely result if these security services were not performed properly. IPC therefore owed a duty to plaintiff, and she can maintain an action in tort for that company's failure to perform these services using reasonable care.

3. The Missouri courts have adopted Section 133 of the Restatement of Contracts, which provides that a person who is not privy to a contract or its consideration has the right to maintain a claim for breach of that contract if he or she was intended to benefit from the contract. Terre du Lac Association, Inc. v. Terre du Lac, Inc., 737 S.W.2d 206, 213 (Mo. App. E.D. 1987). In support of her breach of contract claim, plaintiff showed that the purpose of the security contract between the defendants was to protect Mall patrons such as her, and that she was accordingly an intended beneficiary of that contract. As such she can

maintain an action for the security company's breach of that contract, which led directly to her rape.

Statement of Facts

I. The Violent Crime Problem at the Ward Parkway Mall

According to the defendants' records and the Kansas City, Missouri Police Department's crime index summary and reports, violent crimes occur frequently at the Ward Parkway Mall. Defendants' own internal security reports show that, in the four years prior to the attack on plaintiff, there were 41 reported robberies at the Mall (both armed and strong arm), 65 assaults and batteries, a kidnapping, a sexual assault, and a sexual attack on a fourteen-year-old girl. (LF 848, 868, 880, 1178, 1181, 1186). In 1992 there was an attempted rape. (LF 876).

Defendants have characterized these reported crimes as mere "fist fights among youths, crimes against property or incidents where no serious or permanent injury was sustained." (LF 1376). Defendants' security reports, however, show the violent nature of the reported crimes, the majority of which either threatened or actually resulted in serious physical injury. For example, the security reports show the following specific crimes:

3/13/97	A female victim, after being assaulted and pushed to the ground during a robbery, "was transported to Research Hospital" by ambulance (LF 1027-29);
3/7/97	During an attempted robbery a man "pulled a knife on [the victim's] eldest daughter" (LF 923-24);

2/26/97 An armed robber jumped into a female victim's van, "put his gun to her neck," and stole her van and purse (LF 925-26);

2/8/97 A woman was the victim of a "strong arm" robbery (LF 961);

1/15/97 A woman and her mother were robbed by an armed man who grabbed the mother, pointed his gun at her, and said "give me your purse or I'll kill you" (LF 929-30);

12/2/96 A victim was threatened with a knife (LF 995-96);

12/1/96 A female victim was assaulted by a man who pushed her against her car and said "that he would like to do her" (LF 1034-35);

11/22/96 An armed robber "produced a handgun and pointed it at the victim and said 'give me your money and your jacket'" (LF 932-33);

11/9/96 An offender told a victim "shut the fuck up or I'll shoot you" (LF 997-98);

10/26/96 An armed robbery was committed at the Dillard's Department Store located in the Mall (LF 934);

9/24/96 A young man approached a fourteen year old girl, "grabbed her by the neck with his hand and hit her in the mouth" (LF 1040-44);

9/23/96 A criminal pushed a gun into the victim's side during an armed robbery (LF 935-36);

9/10/96 A woman was threatened by a man claiming to have a gun during a robbery attempt (LF 1074-75);

8/30/96 During the armed robbery of a female victim the robber "stuck a handgun in her face" (LF 937-38);

8/19/96 An armed robber used a handgun (LF 1161-64);

7/26/96 Two women were robbed by a man "holding a small cabiler [sic] pistil [sic] (revolver)" (LF 966-69);

6/18/96 An armed robbery was committed at Helzberg's Diamonds in the Mall (LF 940-41);

6/17/96 An unknown man grabbed the breast of a female victim as she was walking through a door (LF 1049-50);

6/1/96 A female victim was threatened with a knife and kidnapped (LF 916-22);

5/15/96 A woman was robbed by a man armed with a gun (LF 970-72);

4/15/96 A female victim was sexually assaulted in a restroom (LF 416-18);

3/29/96 A victim was robbed by a man who "pointed a gun in [his] face and yelled 'give me the fucking money or I'll blow your face off'" (LF 944-45);

12/2/95 A female victim was beaten inside the Mall (LF 1085-86);

12/1/95 During a robbery an elderly woman was knocked to the ground, causing a head injury that required stitches (LF 973-74);

11/7/95 A female victim was struck in the face by an assailant "so hard that she fell to the floor" (LF 1022-24);

10/29/95 A man hit a woman and "put her in a head lock" (LF 1087-88);

9/29/95 A fourteen-year-old girl was sexually assaulted by a man in a movie theater; the man grabbed her thighs, buttocks and genitals, causing the girl to be "frightened for her life" (LF 912-15);

8/16/95 A woman and her mother were robbed at gunpoint (LF 949-50);

8/11/95 A woman was attacked by three women who "hit her numerous times, pushed her to the ground and continued striking her and began to kick her" (LF 1058);

7/31/95 A woman was injured during an armed robbery when the robbers pushed her to the ground (LF 977-78);

6/30/95 A victim was sprayed in the face with mace during an armed robbery of Coleman's Jewelry inside the Mall (LF 951-55);

6/12/95 A victim was assaulted and robbed at knife point, sustaining injuries to his chest and hands (LF 956-57);

6/10/95 An elderly woman was robbed in the parking lot (LF 979-81);

3/27/95 A young man assaulted a female victim, hitting her "hard enough to make her cry and receive a bruise" (LF 1067);

3/5/95 A woman was assaulted by a man (LF 1068-69);

2/20/95	A woman and her aunt were assaulted and robbed near Dillard's; the aunt sustained injuries in the form of "a hurt right shoulder, a broken ring finger on her left hand and a bruised jaw bone on the left side of her face," for which she received medical treatment at St. Joseph's Hospital (LF 982-83);
2/19/95	A woman was punched in the face during a robbery in the upper parking level (LF 986-87).

This list does not contain all crimes committed at Ward Parkway Mall during the relevant time period, but merely summarizes some of the more recent serious crimes. The complete set of incident reports showing the crimes at the Mall is contained in the legal file at LF 910-1171.[1]

[1] There is no dispute that the defendants were actually aware of the above-listed crimes, because the descriptions of these crimes are taken from their own internal security reports, which defendants reviewed regularly to determine what security measures were needed. Levenberg Depo. at 35:6-10 (LF 735). In addition, plaintiff submitted deposition testimony from defendants' corporate representatives in which they admitted they were aware of the potential for violent crime at the Mall, including sexual assault and rape. Id. at 40:8-41:15 (LF 736-37); Lantz Depo. at 58:8-18 (LF 757). They further admitted that they had a duty to protect the Mall's customers from criminal activity, including sexual assault and rape. Levenberg Depo. at 42:5-22 (LF 737).

Whether because of these violent crimes or for some other reason, defendants commissioned an outside consulting firm to conduct a "Security Audit" of the Mall in 1995. (LF 884). This audit found that the rate of crime directed against persons (as opposed to property crimes, such as theft) had roughly doubled at the Mall from 1994 through the beginning of 1995. (LF 894). The audit specified that "[d]isruptive youth have become an issue at the mall," (LF 897) and "[t]he increasing presence of unruly youth in the interior of the mall could be the cause of the increase . . . ." (LF 894). The audit further listed the Mall's "Catwalk" – the place where plaintiff was raped – as an area of particular concern:

> On the east side of the mall there is a perimeter area referred to as the "Catwalk" which is adjacent to the theater exits on the second level. This area is commonly frequented by unruly youth and is often the cause for Security Officers to constantly patrol due to the high level of incidents that take place. The lighting in the area should be enhanced and at the time of the audit the lights along the base of the wall of the theater exits [were] not illuminated.

(LF 892).[2] In a letter addressed to defendant General Growth, the Mall's management company, the Mall's own tenants echoed and amplified the concerns expressed in the Security Audit:

> This Mall used to be a family oriented Mall. Relatively few crimes of any kind were ever committed on the premises. Over the last year, however, we now have frequent assaults, armed robberies of stores and shoppers, car thefts, vandalism, and an alarming rate of shoplifting. The Mall has recently gotten a city-wide reputation as being dangerous and gang ridden. The mall manager seems to be quite accepting of all this. His response to concerns expressed by tenants and security officers . . . 'well, we're not as bad as some other malls.' He has taken away any protection officers might have or carry on them, and they feel vulnerable. The morale among them, we feel, is now apathetic, and constantly the problems grow worse. The mall has even had near riots on busy nights, and the officers believe they could have easily been seriously hurt, injured or worse.

[2] Although called a "Catwalk," this area is actually a second story walkway and parking lot. It is flush with the building and has stairs leading down to the ground level. Senior citizens use the Catwalk during their morning walks.

> Other shopping center management in the area see the degradation of the Mall and are astounded at the lack of action being taken. They believe that this is in large part preventable. The mall manager says this lawlessness accompanies entertainment or theater type Malls, but we know differently. And the police and security force knows differently.
>
> The new Mall image of being a dangerous place to shop, has resulted in a mall nearly devoid of shoppers. Women we have spoken with lately in social settings, that either know or find out about our relationship to the Mall, tell us they will not shop there because it's dangerous, and it seems like all the tenants are leaving. The men tell us they have warned their wives, children and others not to go to Ward Parkway. The mall manager thinks this is unwarranted behavior, yet only implements action/non-action which promotes it.

(LF 881-82). The tenants further stated in their letter that the defendants' lack of attention "now appears to us to be near deliberate." (LF 881).

II. Security at the Ward Parkway Mall

Security is provided at the Ward Parkway Mall by defendant IPC, "a national firm that specializes in providing security to shopping malls." (LF 898). IPC provides its services exclusively to shopping malls. Lantz Depo at 8:20-9:1 (LF 744). The company

currently provides security at approximately 185 shopping centers. Id. at 9:15-17 (LF 744). IPC considers itself "to be the leader in security for shopping centers," Id. at 25:21-23 (LF 748), and was hired by the Mall based upon its "representations of expertise." Security Agreement at I.6 (LF 1661). The contract between IPC and the other defendants is contained in the Legal File at LF 1657-67.

According to defendants' documents, IPC was hired at the Mall "to create a safe, orderly atmosphere in which customers may relax and shop without undue concern for their own safety." (LF 1736). In particular, the Mall's management acknowledged that the Mall had a duty to protect its customers from crime:

> Q: Do you believe that Ward Parkway Mall has a duty to protect its customers from criminal activity?
>
> A: I believe the owner of the property has a duty, yes.
>
> Q: And as the manager of the property, General Growth would have such a duty in your opinion, correct?
>
> A: Yes.
>
> Q: And that duty would apply to the type of crimes we're talking about -- assault, sexual assault, rape -- correct?
>
> A: Correct.

Levenberg Depo. at 42:5-22 (LF 737) (objections omitted). Because of this acknowledged duty, the Mall's management hired IPC for the express purpose of protecting the Mall's customers:

Q: Is it your position, sir, that Ward Parkway Mall wanted to protect its patrons and customers from being raped while they were at the mall?

A: Yes. We wouldn't want our customers to be raped while they're at the mall.

Q: I'm not only asking you if you would want that to happen. I'm asking you if it's your position that General Growth was attempting to protect customers from the crime of rape through their various security activities that they employed?

A: We're trying to deter that crime from happening, yes. We're trying to deter any crime from happening.

Q: And specifically the crime of rape or sexual assault, correct?

A: Yes. That's a crime.

Daise Depo. at 40:25-41:16 (LF 1440-41); see also id. at 35:8-11 (LF 1439) ("[o]ne of the purposes behind having [IPC] security officers was to deter criminal activity"); Levenberg Depo. at 42:1-4 (LF 737) ("one of the crimes that General Growth was attempting to deter from occurring at Ward Parkway Mall was rape"); Coudriet Depo. at 10:6-10 (LF 768) (IPC security guards are "there to protect the customers of the mall").

Plaintiff also submitted evidence showing that IPC understood it was hired specifically for the purpose of protecting the Mall's customers and employees. For example,

IPC's "Policies and Procedures Manual" – which is incorporated by reference as part of the security contract, Security Agreement I.3.J (LF 1659) – offers the following explanation of the contract's purpose:

> The ultimate goal of any successful shopping center Owner, Developer or Manager is the continued patronage of customers to the mall. In each Center, Mall Management endeavors to create a safe, orderly atmosphere in which customers may relax and shop without undue concern for their own safety. In order to sustain and insure this positive atmosphere, the management of [Ward Parkway Mall] has retained the services of IPC International Corporation to provide Mall Public Safety Services.

(LF 1736); see also Daise Depo. at 14:14-15:4 (LF 1517) ("[c]ustomers come to the shopping center expecting to relax and enjoy themselves while shopping, dining or being entertained. Aside from normal precautions, they are not usually prepared to defend themselves against theft or criminal attack").

IPC's Training Guide – also a part of the security contract (LF 1664) – further explains the reason why the parties entered into that contract:

> Our clients are most concerned with the well being of visitors, customers and employees of the shopping center. It is for this reason that Public Safety Personnel are present. Our client

> understands their responsibility to the public to provide a safe, orderly environment for shoppers and employees alike.

(LF 1739). Moreover, General Growth's corporate representative admitted that the company viewed its contract as creating a duty "to provide security at the mall," Breshears Depo. at 42:17-21 (LF 1489), and both IPC's corporate representative and its guards testified that the company was hired to protect Mall customers from crime, such as sexual assault or rape. Lantz Depo. at 58:8-18 (LF 1445) ("[r]ape is a crime we are constantly vigilant for in all areas of the shopping center"); Coudriet Depo. at 43:14-17 (LF 1448).[3] Nothing in the contract between the Mall defendants and IPC purports to limit IPC's duties and liability to the public or third parties. Rather, the contract specifically contains a provision whereby IPC agrees to indemnify the other defendants for claims arising from its "negligent, grossly

[3] Due to its experience in providing security for malls, IPC was aware of the special need to protect against rape and sexual assault. IPC's training manual warns that "the potential for sexual assault is present" at malls and cites "[f]our main factors [that] contribute to the likelihood of this situation." (LF 1738). IPC's security officers testified that conditions at the Ward Parkway Mall are "four for four" with respect to these factors. Swann Depo. at 27:4-28:23 (LF 793); Viets Depo. at 9:18-17:7 (LF 817-18). IPC's knowledge of the danger of rape at shopping malls is further evidenced by the fact that the company is currently being sued by other women whom it allowed to be raped at other malls where it provides security services. Lantz Depo. at 20:11-15 (LF 747).

negligent, intentional or willful" acts or omissions in providing security services. Security Agreement at I.5.E (LF 1661). IPC is also required to maintain adequate insurance for claims based on its failure to provide security services. Id. at I.5.D.v (LF 1661).

Under its contract with defendants, IPC agreed to perform "general security duties" at the Ward Parkway Mall. Id. at I.3 (LF 1657-59). Although the contract does not specifically identify all such duties, it requires "at a minimum" that IPC perform certain duties. Id. IPC must "[m]ake frequent, random rounds of the premises," which includes "checking gates, doors, windows, and lights." Id. at I.3.A (LF 1657). It is required to report immediately any criminal activities or suspicious activities, as well as any hazardous conditions or defects on the premises. Id. at I.3.B (LF 1658). A security log report must be made of all such activities and/or hazardous conditions. Id. at I.3.C (LF 1658). IPC must recommend "the proper level of staffing needed to provide adequate security" at the Mall, and its recommendation is "conclusively deemed for all purposes to be a material representation . . . that the staffing level is one which will provide full and adequate security to the Mall." Id. at VI.5 (LF 1666). In addition, IPC's security officers must "conduct themselves at all times with a friendly and helpful attitude," id. at I.3.F (LF 1658), and should "detain an individual when necessary to protect either that individual or mall customers or employees from risk of serious injury." Id. at I.3.H (LF 1658). All of these duties must "be performed in accordance with accepted security practices and standards." Id. at I.6 (LF 1661).

III. The Assault and Rape of Plaintiff L.A.C.

Plaintiff L.A.C., who was twelve years old at the time, went to the Ward Parkway Mall on Saturday, March 15, 1997, to see a movie with a friend. L.A.C. Depo. at 7:12-8:21 (LF 691). After leaving the movie she saw a young man – 15 years old – with whom she had spoken at the Mall the week before. Id. at 12:10-13:5, 21:12-17 (LF 693). While plaintiff was talking to this young man, at around 9:00 p.m., he gave her a quick and unexpected kiss that "was done before I would even react," and he also gave her a hickey. Id. at 45:11-23 (LF 697). He then took her purse and ran off with it into a hallway. Id. at 37:25-38:9 (LF 696). Plaintiff ran and caught him. Id. at 40:14-41:17 (LF 697). She said "[g]ive me back my purse," and he replied "[n]o, not till you give me a kiss." Id. at 41:21-42:17 (LF 697). Because she wished to get her purse back, she gave him a short kiss. Id. at 44:11-24 (LF 697). Being only 12 years old, she had never kissed a boy before that night. Id. at 45:6-8 (LF 697). She was a virgin. Id. at 50:23-24 (LF 698).

The young man gave plaintiff's purse back to her, but as she walked away he turned, grabbed her, and said "[l]et's do it." Id. at 48:20-49:8 (LF 698). "[H]is voice got deeper and then [she] felt kind of threatened." Id. 73:14-21 (LF 702). She was scared and didn't want to make him mad "because [she] didn't know what he was capable of doing." Id. at 74:18-75:2 (LF 702). The young man picked her up and "[s]he started screaming and she hit him on his back and said 'Put me down.'" Griddine Depo. at 49:9-14 (LF 842). Plaintiff's male friends refused to help her "because he was bigger than them." Id. He also "had his gun showing." Id. at 26:11-22 (LF 838).

After she hit him, the young man briefly put plaintiff down. Id. at 49:9-14 (LF 842). After plaintiff told him no, however, he said "we're going to do this," again picked her up over his shoulder, and carried her out an unlocked and unalarmed emergency exit door to the "Catwalk" area, just outside the door on the Mall's second floor. L.A.C. Depo. at 55:23-56:20 (LF 699); id. at 62:20-24 (LF 700); Breshears Depo. at 60:22-61:16 (LF 1493-94).[4] She tried to kick, but he stopped her. Id. at 58:1-59:1 (LF 700). She screamed, but no one responded. Id. at 61:3-12 (LF 700). Once outside, the young man shook plaintiff and pushed her up against the wall. L.A.C. Depo. at 80:14-21 (LF 703). She cried "Stop. Stop. Let go of me. Leave me alone." Id. at 81:1-3 (LF 703). He shouted back for her "to quit fighting it." Id. at 81-4:10 (LF 703). He threw her down onto the ground on her back. Id. at 81:20-82:1 (LF 703-04). Once on the ground he told her "Don't move. You better stop. You just better stop." Id. at 84:13-19 (LF 704). He then brutally raped her. Id. at 92:2-93:7 (LF 705). Every time she tried to rise up he would put his knee in her stomach and push her down. Id. at 83:10-21 (LF 704). While raping her, he kept calling plaintiff a "bitch." Id. at 106:19-25 (LF 708). Plaintiff suffered bruises and cuts from the attack, as well as marks on her arms from the forceful restraint. Id. at 118:25-119:16 (LF 710). The young man was later caught and convicted in juvenile court.

Plaintiff was crying when she went back into the Mall after the rape. Id. at 95:1-3 (LF 706). She walked through the Mall with tears streaked on her face. Id. at 96:24-

[4] This was a large walkway, flush with the building, a few feet away from a parking lot. Swann Depo. at 33:17-34:20 (LF 795).

97:5 (LF 706). The young man told her "not to say anything to anybody." Id. at 99:16-20 (LF 706). For a brief time, still in shock, she obeyed. However, a minute or two later, when she was alone with her friend Alicia, she broke down and cried that "she didn't want to" and "she said that he raped her." Griddine Depo. at 32:9-17 (LF 839). She said this "over and over." Id. Plaintiff reported the rape to the police that very same night. Id. at 50:11-14 (LF 842). She received medical treatment that night at St. Joseph's Hospital, L.A.C. Depo. at 119:25-120:2 (LF 710), and she has required extensive counseling to help her deal with the rape. Id. at 123:1-124:22 (LF 710-11).

When plaintiff was first attacked her friend Alicia heard her scream and saw the young man carry her through the emergency exit door. Griddine Test. at 39:7-20, 43:14-20 (LF 1546, 1550). Alicia, looking around frantically, found an IPC security guard within one minute and told her plaintiff was in trouble and needed help. Id. at 39:25-40:6 (LF 1546-47). She specifically told the guard which door plaintiff had been taken out, Id. at 40:7-15 (LF 1547), and said the young man "had his gun showing." Griddine Depo. at 25:23-26:22 (LF 838). IPC's guard ignored her plea for help, however, and said the attacker "was just playing," Griddine Test. at 40:12-21 (1547). The guard then "went on to something else happening in the mall." Id. (LF 1547). Alicia did not give up, but instead found another IPC officer and told him plaintiff was in trouble and needed help. Id. at 40:24-41:12 (LF 1547-48). This IPC officer also ignored her plea and "went on with his business." Id. at 41:20-23 (LF 1548). The rape of plaintiff lasted for approximately 20 minutes, and thus could have been prevented if IPC's officers had responded when informed of the assault. L.A.C. Depo. at 91:18-22 (LF 705); Griddine Test. at 41:26-42:2 (LF 1549).

Plaintiff also produced evidence showing that the Mall's security on that night was deficient in other respects. For example, a vital security position was unmanned due to a lack of staffing. Ward Parkway Mall places security officers on its roof, which by its own admission is "a common deployment tactic at shopping centers." Levenberg Depo. at 28:13-17 (LF 733). The Mall's rooftop guards are placed in assigned positions known as "Eagle One" and "Eagle Two." Coudriet Depo. at 29:12-17 (LF 773). Eagle Two has "total access, total view" to the area where plaintiff was raped, id. at 27:3-8 (LF 772), and is "the patrol person who would be in the best possible position to prevent a crime from occurring in [that area]." Id. at 32:14-23 (LF 773). IPC admitted that even though the Eagle positions are supposed to be manned on Friday and Saturday nights, Viets Depo. at 28:6-13 (LF 821), there were sometimes too few officers available for deployment in those positions. Id. at 29:18-30:5 (LF 822). Eagle Two was not manned on the night that plaintiff was raped, which was a Saturday. Coudreit Depo at 64:15-17, 65:17-17, 69:1-5 (LF 781-783). This allowed the crime to occur. Defendants' security guards testified that having more officers on duty would have been beneficial, because that would have allowed the Eagle Two position to be manned every Friday and Saturday night. Coudriet Depo. at 35:8-17 (LF 774); Swann Depo. at 97:8-18 (LF 811).

Lack of proper lighting also contributed to plaintiff's rape. Defendants freely admitted that proper lighting is a major component in preventing crimes at the Mall. Breshears Depo. at 108:17-21 (LF 1505); Swann Depo. at 25:14-19 (LF 793); Daise Depo. at 75:25-76:12 (LF 1532); Levenberg Depo. at 28:18-29:4 (LF 733-34); Viets Depo. at 48:14-21 (LF 826) ("darkness affords a rapist with an advantage"). Indeed, defendants' own

Security Audit in November of 1995, which had identified the Catwalk as a security risk with a "high level of incidents" (LF 892), specifically recommended that "[t]he lighting in the area should be enhanced . . . ." (LF 892). Despite this earlier recommendation, however, all six lights on the overhang outside of the emergency exit door where plaintiff was raped were burned out on the night of March 15, 1997. Daise Depo. at 50:14-17 (LF 1526). Even several weeks after plaintiff's rape defendants had not bothered to fix the lights. Coudriet Depo. at 61:15-18 (LF 781).

The security problem on the Catwalk was compounded by IPC's failure to recommend – and the Mall's failure to install – proper alarms and monitoring equipment, such as closed circuit television. The Mall's management company, defendant General Growth, manages 125 malls nationwide. Levenberg Depo. at 11:24-12:2 (LF 729). Of these malls, approximately 10 to 15 percent have closed circuit television. Id. at 12:16-19 (LF 729). Ward Parkway Mall did not. Id. at 13:6-8 (LF 730). IPC's security guards testified that closed circuit television would have been beneficial in the Catwalk area and they wished it had been in place:

> Q: Do you believe in your experience as a security officer at Ward Parkway that it would be beneficial to have closed-circuit television on the Catwalk area?
>
> A: I think it would help assist our job, yes.
>
> Q: It would help you to prevent criminal activities because that's part of your job, correct?
>
> A: Yes, sir.

Q: Is that something you wish had been in place back during the time period of March of 1997, a closed-circuit television?

A: It would have helped, sir.

Coudriet Depo. at 45:21-46:14 (LF 777) (objections omitted); accord Swann Depo. at 63:13-22 (LF 802). Defendants decided not to install closed circuit television because of its cost. Daise Depo. at 66:13-23 (LF 1530).

The lack of proper alarms on emergency exits was still another security problem at the Mall. Plaintiff was carried outside to the Catwalk through an exit door marked "employees only," which was not open to the public. L.A.C. Depo. at 59:23-60:6 (LF 700). If there had been an alarm on this door, the Mall's security guards would have been alerted immediately and would have been in a position to prevent the rape. Coudriet Depo at 43:18-44:2 (LF 776). Even before plaintiff's rape IPC's security guards had discussed the need for an alarm on this door:

Q: [Y]ou heard discussion during the time period of January 1997 through March 15, 1997 that it would be a good thing if the management or owners of the Mall would agree to install a security alarm on that door, correct?

A: I -- like I said, I did not participate. I just heard.

Q: You didn't participate in the discussions, you just overheard the discussions, correct?

A: They would talk about it when we went down to the security offices.

* * *

Q: And that's how comments on improvements of security were made and you heard them being made, being made up the chain of command, correct?

A: Yes.

Q: And it wasn't only a discussion about the fact that it would be good to install an alarm on this particular door that goes out to the cubbyhole, but on all emergency fire exit doors, correct?

A: That's correct.

Viets Depo. at 43:25-45:17 (LF 825-26) (objections omitted). The guards testified that they "wish[ed] the mall would have installed something on that door . . . ." Swann Depo. at 87:2-10 (LF 808); accord Coudriet Depo. at 46:9-19 (LF 777).

No alarm has been placed on that door to this day. Daise Depo. at 52:3-12 (LF 1526). In fact, although defendants profess sorrow that plaintiff was attacked, they admit that they have taken no measures to prevent any similar attacks in the future. The Catwalk area is still the same. Coudriet Depo. at 62:15-18 (LF 781); Swann Depo. at 84:13-84:8 (LF 807). IPC has not modified any of its procedures or "do[ne] anything at all different in response to this rape." Breshears Depo. at 96:20-24 (LF 1502). IPC's Director of Security testified that he never thought about how security might be improved after the rape. Id. at

88:19-89:3 (LF 1500). And the Mall's management admits that it has taken no additional security steps of any kind. Levenberg Depo. at 52:18-53:5 (LF 739-40).

Proceedings Below

Plaintiff filed her Petition for Damages on January 18, 1998. (LF 13). She filed her Second Amended Petition on October 8, 1998. (LF 467). She named as defendants to this petition: (1) Ward Parkway Shopping Center Company, L.P. ("WPSCC"); (2) W.S.C. Associates, L.P. ("WSC"); (3) G.G. Management Company, Inc. ("General Growth"); and (4) IPC International Corporation ("IPC"). She claimed damages from WPSCC, WSC and General Growth because they owned and managed the Ward Parkway Mall, had knowledge of the danger of violent crime on the premises, but nevertheless failed to take reasonable steps to protect her or warn her of that violent crime problem. (LF 223-31). She claimed damages from IPC because it had contracted with General Growth to protect Mall patrons such as her from crime, including rape, but had failed to provide the promised security services. (LF 222-23). The case was assigned to the Honorable K. Preston Dean.

Defendants made little effort to justify their lack of security during the proceedings below. Their discovery answers were evasive. In particular, the owner and manager defendants failed to give any responses at all until ordered to do so by the Circuit Court. (LF 58). When finally forced to answer, they claimed they had "no information" about the most basic facts of the case, such as the number of crimes reported at the Mall or the identity of witnesses. (LF 168, 170, 197, 198). These tactics led the Circuit Court to impose sanctions:

> I am not sure if the answers are untrue. They certainly seem evasive, meaningless and misleading. Perhaps they are the best defendants can do. Perhaps defendants have no interest in the safety of people in and around their mall and, therefore, truly have no information on these subjects. I think Ordering further answers would simply waste our time. I assume obfuscation and delay is the only response we will receive from these defendants.
>
> * * *
>
> These defendants will not take any position during the remainder of this proceeding inconsistent with these answers without amending the answer and providing a full explanation of why the amendment is necessary.

(LF 218). Plaintiff was also awarded her attorneys' fees incurred in bringing her motion for sanctions. Id. Only after these sanctions were entered did defendants finally produce their massive volumes of incident reports and other documents evidencing the violent crimes occurring at the Ward Parkway Mall.

Having offered no explanation for their conduct, defendants instead moved for summary judgment based solely on the legal issue of duty. Defendants argued that they had no duty to plaintiff because crime at their Mall was not foreseeable. In particular, they argued that there had been too few violent crimes at the Mall to put them on notice of the need to take greater precautions. (LF 247, 651). Plaintiff responded by producing the

evidence discussed in the Statement of Facts above – 41 robberies at the Mall (both armed and strong arm), 65 assaults and batteries, a kidnapping, a sexual assault, a sexual attack on a fourteen year old girl, and an attempted rape. (LF 848, 876, 868, 880, 1178, 1181, 1186). All of this information was taken from defendants' own security records. The Circuit Court granted defendants' motion, holding that "even if all the incidents were considered, they are not sufficiently similar to the incident alleged by L.A.C. to create liability. The incidents are also not sufficiently numerous to create premises liability." (LF 1753).[5] The Circuit Court did rule, however, that factual issues remained as to whether defendants General Growth and IPC had assumed by contract an obligation to protect plaintiff. (LF 1617). The Court gave plaintiff ten days to amend her petition to allege that theory more fully. (LF 1618).

Plaintiff promptly did so, filing her Third Amended Petition on October 14, 1999. (LF 1632). That petition stated two causes of action against IPC: (1) for negligence, because IPC assumed responsibility for providing security at the Ward Parkway Mall, but then failed to exercise reasonable care in that undertaking (LF 1650-55); and (2) for breach of contract, because IPC entered into a contract to provide security at the Mall, which was

[5] The Circuit Court actually granted summary judgment as to plaintiff's negligence claim against the Mall defendants on October 9, 1999, but stated it did "not presently have time to prepare a lengthy memorandum." (LF 1617). The Circuit Court issued its final memorandum and judgment as to all defendants on November 22, 1999. (LF 1749). A copy of the November 22, 1999 Order is attached at Tab 1.

in effect on March 15, 1997, and in making that contract the parties intended to benefit the Mall's patrons and customers, including plaintiff, thus making her a third party beneficiary to that agreement. (LF 1639-44).[6] Plaintiff attached a copy of the contract to her petition. (LF 1657-67). IPC then moved to dismiss, or in the alternative for judgment on the pleadings, arguing that the petition was procedurally deficient and, in the alternative, that it had not assumed any duty to the public and plaintiff was not a third party beneficiary of its contract. (LF 1688). Plaintiff responded to IPC's technical argument by citing to the express allegations of her petition, and she further supplied contractual language and other evidence showing that the parties did intend for IPC to protect Mall patrons such as her. (LF

[6] Plaintiff also asserted similar claims for negligence and breach of contract against General Growth, the company operating the Mall. That company's contract, however, contains a provision specifically stating "[t]his Agreement shall be binding upon and inure to the benefit of the parties hereto and their permitted successors and assigns, but shall not inure to the benefit of, or be enforceable by, any other person or entity." (LF 1804). Such a provision is conspicuously absent from IPC's contract. Because General Growth did not contract to provide security services, and because it specifically stated an intent not to assume a duty or to create third party beneficiaries to its contract, plaintiff is not appealing the dismissal of its contract-based claims against General Growth. Plaintiff continues to assert on appeal that General Growth owed her a duty to exercise reasonable care based on its knowledge of the pattern of violent crime at the Ward Parkway Mall.

1714-1727). The Circuit Court held "[t]here is no procedural ground to dismiss," (LF 1758) and then went on to decide the duty issue on the merits. It ruled that IPC had assumed no duty, and that plaintiff "is not a third party beneficiary" to the contract "[f]or the reasons stated above." (LF 1758). The record is not clear as to what reasons the Court was referring. It did not cite to any language in the IPC contract or discuss the evidence produced by plaintiff. (LF 1757-58). The Court then entered judgment in favor of IPC and against plaintiff.[7]

Plaintiff appealed. On April 17, 2001, the Missouri Court of Appeals, Western District, reversed the Circuit Court's decision in its entirety. The Court of Appeals held that the pattern of violent crime documented in defendants' security reports was sufficient to give rise to a duty on the part of the Mall's owners and managers to take reasonable steps to protect the Mall's patrons from criminal attack. L.A.C. v. Ward Parkway Shopping Center Company, 2001 WL 376347 at *11 (Mo. App. W.D. April 17, 2001) (Tab 2). The Court of Appeals further held that IPC had, by virtue of its contract to provide security at the Ward Parkway Mall, assumed a duty of care and was liable to mall patrons if it failed to exercise reasonable care in that undertaking. Id. at *18. On defendants' motion, this Court ordered the case transferred on August 21, 2001.

[7] On December 22, 1999, plaintiff filed a motion for rehearing, or for a new trial. (LF 1761). The Circuit Court denied that motion on January 6, 2000. (LF 1773). Plaintiff filed her notice of appeal on January 13, 2000. (LF 1774).

Points Relied On

1. The Circuit Court erred in granting summary judgment in favor of the owners and managers of the Ward Parkway Mall on plaintiff's negligence claim because violent crime was foreseeable at the Mall, thus creating a duty on the part of these defendants to take reasonable steps to protect Mall patrons such as plaintiff, in that plaintiff produced both defendants' own security reports and records from the Kansas City, Missouri Police Department, each of which showed numerous violent crimes occurring at the Ward Parkway Mall prior to the rape of plaintiff, thus placing defendants on notice of a danger to their invitees.

Madden v. C & K Barbecue Carryout, Inc., 758 S.W.2d 59 (Mo. banc 1988)

Decker v. Gramex Corp., 758 S.W.2d 59 (Mo. banc 1988)

Bowman v. McDonald's Corp., 916 S.W.2d 270 (Mo. App. W.D. 1995)

Pickle v. Denny's Restaurant, Inc., 763 S.W.2d 678 (Mo. App. W.D. 1988)

2. The Circuit Court erred in granting judgment on the pleadings in favor of defendant IPC on plaintiff's negligence claim because IPC assumed a duty in tort to Mall patrons such as plaintiff when it contracted to provide security services at the Ward Parkway Mall, in that plaintiff alleged sufficient facts in her Third Amended Petition to establish that IPC had assumed a duty to Mall patrons under that contract, and in that plaintiff produced evidence in support of her allegations, in the form of the contract language itself, IPC's

Policies and Procedures Manual (which was part of the contract) and the testimony of IPC's security guards, all showing that IPC agreed under its contract to assume responsibility for providing security at the Mall, including the responsibility to determine proper staffing levels, and that the company knew or should have known that its failure to provide such security and/or determine proper staffing levels would likely result in injury to third persons such as plaintiff.

Westerhold v. Carroll, 419 S.W.2d 73 (Mo. 1967)

Brown v. National Super Markets, Inc., 679 S.W.2d 307 (Mo. App. E.D. 1984)

Holshouser v. Shaner Hotel Group Properties One Limited Partnership, 518 S.E.2d 17 (N.C. Ct. App. 1999)

Professional Sports, Inc. v. Gillette Security, Inc., 766 P.2d 91 (Ariz. Ct. App. 1988)

3. The Circuit Court erred in granting judgment on the pleadings in favor of defendant IPC on plaintiff's breach of contract claim because there was a disputed issue of fact as to whether plaintiff was a third party beneficiary to IPC's contract with the Ward Parkway Mall to provide security services, in that plaintiff alleged sufficient facts in her Third Amended Petition to establish that she was a third party beneficiary to that contract, and in that plaintiff produced evidence in support of her allegations in the form of the contract language itself (including IPC's Policies and Procedures Manual and Training Guide, which were part of the contract), as well as testimony by the parties' corporate representatives, the Mall manager, and IPC's security guards, all showing that the purpose

of the security contract and the intent of the parties in hiring IPC was to protect Mall patrons such as plaintiff.

Miller v. SSI Global Security Service, 892 S.W.2d 732 (Mo. App. E.D. 1994)

Brown v. National Super Markets, Inc., 679 S.W.2d 307 (Mo. App. E.D. 1984)

McCullion v. Ohio Valley Mall Co., 2000 WL 179368 (Ohio Ct. App. Feb. 10, 2000)

Elizabeth E. v. ADT Security Systems West, Inc., 839 P.2d 1308 (Nev. 1992)

Summary of Argument

The defendants in this case were fully aware of the violent crime problem at the Ward Parkway Mall, and particularly in the Mall's "Catwalk" area, as evidenced by their own incident reports and security audit. Yet they failed to take any reasonable steps to protect their patrons from those crimes. Defendants' guards ignored calls for help. The rooftop position overlooking the Catwalk area was frequently unmanned, and was unmanned on the night of March 15, 1997. The lighting in the Catwalk area was burned out. And needed safety devices, such as a door alarm and closed circuit television, had not been installed. As a result, a twelve-year-old girl was brutally raped. Each of the defendants should be held accountable for their acts and omissions causing that rape, for the following reasons.

First. This Court has squarely held that business owners owe a duty to protect their invitees from criminal attacks if violent crime is foreseeable on their property. The duty is established by showing that the business owner knew or had reason to know of prior violent crimes occurring on his or her premises. Madden v. C & K Barbecue Carryout, Inc., 758 S.W.2d 59, 62 (Mo. banc 1988); Decker v. Gramex Corp., 758 S.W.2d 59, 62 (Mo. banc 1988). Madden and Decker held that seven to fourteen prior violent crimes are sufficient to create this duty, and the Courts of Appeals have consistently followed that rule. Here plaintiff produced evidence of 37 violent crimes occurring at the Ward Parkway Mall in just the 25 months prior to her rape, and the Court of Appeals correctly applied Madden and Decker in holding that defendants owed her a duty to take reasonable steps to protect her safety.

Second. When a party agrees by contract to do things which, if left undone, would likely injure third persons, that party is liable to third persons injured thereby for his failure to do that which he agreed to do, which he assumed responsibility for, and which was reasonably necessary to be done for their protection. Westerhold v. Carroll, 419 S.W.2d 73, 80 (Mo. 1967). In particular, a company that undertakes by contract to provide security services at a commercial establishment open to the public assumes a duty to exercise reasonable care in that undertaking. Brown v. National Super Markets, Inc., 679 S.W.2d 307, 309-10 (Mo. App. E.D. 1984). Plaintiff here showed that defendant IPC contracted to perform specific security duties at the Ward Parkway Mall, but was negligent in its performance. IPC knew from its own incident reports that violent crime was a problem at the Ward Parkway Mall, and it could foresee that Mall patrons would be endangered if it

failed to perform its security duties properly. IPC therefore owed plaintiff a duty to exercise reasonable care in its undertaking to provide security.

Third. The Missouri courts have held that a person who is not privy to a contract or its consideration has the right to maintain a claim for breach of that contract if he or she was intended to benefit from that contract. Terre du Lac Association, Inc. v. Terre du Lac, Inc., 737 S.W.2d 206, 213 (Mo. App. E.D. 1987). In particular, shoppers and business invitees may be third party beneficiaries to a business owner's contract with a security company. Miller v. SSI Global Security Service, 892 S.W.2d 732, 734 (Mo. App. E.D. 1994); Brown v. National Super Markets, Inc., 679 S.W.2d 307, 309-10 (Mo. App. E.D. 1984). The intent of the parties is controlling. Here plaintiff produced substantial evidence showing that when the Mall defendants contracted with IPC to provide security, they acted specifically because they believed they had a duty to protect the public. The purpose of the contract was to satisfy the Mall's "actual, supposed or asserted duty" to its patrons such as plaintiff. She is therefore an intended beneficiary of that contract, and she is entitled to bring a breach of contract action against IPC for its failure to provide the promised security services.

For each of these reasons, and as more fully set forth below, the Circuit Court's order granting summary judgment and judgment on the pleadings in favor of the defendants should be reversed, and this case should be remanded for a trial on the merits.

Standards of Review

The Circuit Court entered summary judgment against plaintiff on her negligence claim against the owners and managers of the Ward Parkway Mall. When considering an appeal from summary judgment, the Court reviews the record in the light most favorable to the non-movant (here plaintiff). ITT Commercial Finance v. Mid-America Marine, 854 S.W.2d 371, 376 (Mo. banc 1993). The standard of review is de novo. Id. "As the trial court's judgment is founded on the record submitted and the law, an appellate court need not defer to the trial court's order granting summary judgment." Id.

The Circuit Court further entered judgment on the pleadings against plaintiff on her negligence and breach of contract claims against defendant IPC. In an appeal from such a ruling, "the sole issue to be decided is whether, after allowing the pleading its broadest intendment, treating all facts alleged as true and construing all allegations favorably to plaintiffs, the averments invoke principles of substantive law entitling [plaintiff] to relief." Lowery v. Horvath, 689 S.W.2d 625, 626 (Mo. banc 1985); Shapiro v. Columbia Union National Bank & Trust Co., 576 S.W.2d 310, 312 (Mo. banc 1978). In this case, however, the parties submitted materials outside the pleadings and the Circuit Court seems to have considered those materials in rendering its decision. The Circuit Court's decision may therefore be treated as one granting summary judgment, Supreme Court Rule 55.27(b), and the standards of review established in ITT Commercial Finance apply.

Argument

Point 1

The Circuit Court erred in granting summary judgment in favor of the owners and managers of the Ward Parkway Mall on plaintiff's negligence claim because violent crime was foreseeable at the Mall, thus creating a duty on the part of these defendants to take reasonable steps to protect Mall patrons such as plaintiff, in that plaintiff produced both defendants' own security reports and records from the Kansas City, Missouri Police Department, each of which showed numerous violent crimes occurring at the Ward Parkway Mall prior to the rape of plaintiff, thus placing defendants on notice of a danger to their invitees.

I. Defendants Owed Plaintiff and Other Mall Patrons a Duty to Take Reasonable Measures to Protect Against Criminal Attacks, Because Violent Crime Was Foreseeable at the Mall

Plaintiff's petition asserted a cause of action for negligence against the defendants who owned and operated the Ward Parkway Mall. "A petition seeking damages for negligence must allege ultimate facts which, if proven, show: 1) the existence of a duty on the part of the defendant to protect the plaintiff from injury, 2) breach of that duty, 3) causation, and 4) injury to the plaintiff." Madden v. C & K Barbecue Carryout, Inc., 758 S.W.2d 59, 61 (Mo. banc 1988); accord Virginia D. v. Madesco Investment Corp., 648 S.W.2d 881, 886 (Mo. banc 1983); Groce v. Kansas City Spirit, Inc., 925 S.W.2d 880, 884 (Mo. App. W.D. 1996). The second, third and fourth elements are not at issue in this appeal

– there is no dispute that plaintiff has produced sufficient evidence of breach, causation and injury to submit her case to a jury. Rather, the defendants claimed below, and the Circuit Court ruled, that plaintiff could not establish the first element, i.e., that defendants had a duty to protect her from injury.

The Circuit Court cited in its decision the general rule that "a business owner has no duty to protect an invitee from a deliberate criminal attack by a third person." (LF 1780). However, "[t]he abstract proposition that there is no duty to protect against criminal misconduct is substantially attenuated in several recent cases." Aaron v. Havens, 758 S.W.2d 446, 447 (Mo. banc 1988). This Court has specifically recognized that:

> business owners may be under a duty to protect their invitees from the criminal attacks of unknown third persons depending upon the facts and circumstances of a given case. The touchstone for the creation of a duty is foreseeability. A duty of care arises out of circumstances in which there is a foreseeable likelihood that particular acts or omissions will cause harm or injury.

Madden, 758 S.W.2d at 62; accord Keesee v. Freeman, 772 S.W.2d 663, 668-69 (Mo. App. W.D. 1989); Pickle v. Denny's Restaurant, Inc., 763 S.W.2d 678, 681 (Mo. App. W.D. 1988). The Missouri courts have therefore carved out numerous exceptions to the general no-duty rule, categorizing these exceptions under the headings of "special relationships" and "special facts and circumstances." Groce, 925 S.W.2d at 884-85.

The first category of these exceptions "impose[s] liability if the plaintiff shows that a special relationship existed between the plaintiff and the defendant such that the plaintiff entrusted himself or herself to the protection of the defendant and relied upon the defendant to provide 'a place of safety.'" Groce, 925 S.W.2d at 884 (quoting Claybon v. Midwest Petroleum Co., 819 S.W.2d 742, 744 (Mo. App. E.D. 1991) and Faheen v. City Parking Corp., 734 S.W.2d 270, 272 (Mo. App. E.D. 1987)). Historically these special relationships "have been limited to relationships such as those of common carrier-passenger, school-student, innkeeper-guest, and sometimes employer-employee." Groce, 925 S.W.2d at 884-85 (citing Claybon, 819 S.W.2d at 744 and Faheen, 734 S.W.2d at 272). In these situations the relationship alone may give rise to the duty. Groce, 925 S.W.2d at 885; Faheen, 734 S.W.2d at 272. Plaintiff does not claim in this case that any such special relationship existed between her and the owners and managers of the Ward Parkway Mall.

The second category of exceptions, involving special facts and circumstances, takes two forms. First, "it is applied where 'a person known to be violent, is on the premises, or an individual is present who has acted in such a way as to indicate danger' and sufficient time exists to prevent injury." Groce, 925 S.W.2d at 885 (quoting Claybon, 819 S.W.2d at 745); Faheen, 734 S.W.2d at 273). Plaintiff has not alleged any cause of action under this theory.

The second form of the special facts and circumstances exception is the known as the "prior violent crimes" rule. This rule creates a duty "when the landowner knows or has reason to know from past experience that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of visitors, even if the

landowner has no reason to expect harmful conduct on the part of any particular individual." Madden, 758 S.W.2d at 62 (citing Restatement (Second) of Torts, Section 344, comment f (1977)). Such liability is proper because as "between the proprietor and his invitee, the former is in the best position to take measures to avoid the injury, provided that the likelihood of injury is reasonably foreseeable." Id. at 65 (Robertson, J., concurring). This is the rule that applies here – the owners and managers of the Ward Parkway Mall knew from past experience that crime at the Mall was endangering the safety of the Mall's patrons, and they accordingly had a duty to take reasonable steps to protect their patrons from that known crime problem.

A. Plaintiff Has Identified a Sufficient Number of Prior Violent Crimes at the Ward Parkway Mall to Establish Defendants' Duty Under the Prior Violent Crimes Rule

To establish a defendant's duty under the prior violent crimes rule, the Missouri courts have required a plaintiff to prove three elements. First, the plaintiff must show the "necessary relationship" between herself and defendants, "that of a business or property owner to an invitee." Smoote v. Sinclair Oil Corp., 1999 WL 1219882 at *5 (Mo. App. E.D. Dec. 21, 1999), transfer granted, (Mo. banc Apr. 25, 2000) (attached at Tab 3); Groce, 925 S.W.2d at 885; Keenan v. Miriam Foundation, 784 S.W.2d 298, 303 (Mo. App. E.D. 1990). Second, she must show "prior specific incidents of violent crimes on the premises that are sufficiently numerous and recent to put Defendant[s] on notice, either actual or constructive, that there is a likelihood that persons will endanger the safety of [their] invitees." Smoote, 1999 WL 1219882 at *5; Groce, 925 S.W.2d at 885; Keenan, 784

S.W.2d at 303. And third, she must show that "the incident causing the injury is sufficiently similar in type to the prior specific incidents occurring on the premises that a reasonable person would take precautions against that type of activity." Smoote, 1999 WL 1219882 at * 5; Groce, 925 S.W.2d at 885; Keenan, 784 S.W.2d at 303. Plaintiff has produced substantial evidence to satisfy each of these elements.

1. Plaintiff Was an Invitee of the Ward Parkway Mall

With regard to the first element of the prior violent crimes rule, it is undisputed that plaintiff was an invitee of the Ward Parkway Mall. "'A person is an invitee if the premises are thrown open to the public and the person enters pursuant to the purposes for which they were thrown open . . . .'" Smoote, 1999 WL 1219882 at *6; (quoting Carter v. Kinney, 896 S.W.2d 926, 929 (Mo. banc 1995)). The Ward Parkway Mall is open to the public for the purpose of shopping and entertainment. Plaintiff came to the Mall to see a movie shown by AMC, one of Ward Parkway's tenants. L.A.C. Depo. at 7:12-8:21 (LF 691). Defendants admitted below that plaintiff was an invitee (LF 650), and they should not be heard to claim otherwise now.

2. Plaintiff Has Produced Evidence Showing a Large Number of Recent Prior Violent Crimes at the Ward Parkway Mall

The second element of the prior violent crimes rule is quantitative. Plaintiff must show prior crimes at the Ward Parkway Mall – sufficiently numerous and recent – so that the defendants could reasonably foresee the possibility of criminal attacks on their patrons. In this Court's leading cases applying the rule, Madden v. C & K Barbecue Carryout, Inc., 758 S.W.2d 59, 62 (Mo. banc 1988) and Decker v. Gramex Corp., 758

S.W.2d 59, 63 (Mo. banc 1988), the Court looked to crimes going back for three years. That time period was based on the pleadings in those cases, however, and the Court never suggested that three years was the limit on relevant prior crimes. Madden, 758 S.W.2d at 62; Decker, 758 S.W.2d at 63. The Courts of Appeals, by contrast, have approved looking back as far as five years, which is a more accurate measure of whether crime is foreseeable on a particular property. Wood v. Centermark Properties, Inc., 984 S.W.2d 517, 524 (Mo. App. E.D. 1998). Either way, the number of prior violent crimes at the Ward Parkway Mall is sufficiently large to place its owners and managers on notice regarding the likelihood of violent attacks on the Mall's patrons.

The Missouri courts have consistently held a duty to exist under the prior violent crimes rule based upon a far lower number of prior crimes than is presented in this case, usually in the range of seven to fourteen. In Madden, for example, this Court found a duty was created in favor of the plaintiff rape victim by a showing of 14 crimes over a three-year period, including six armed robberies, six strong arm robberies, one assault and one purse snatching. Madden, 758 S.W.2d at 62-63. In Decker, also involving a rape victim, this Court held that although one armed robbery, one purse snatching and multiple thefts might not be sufficient to create a duty, allegations including four armed robberies, an assault, an assault with a deadly weapon, and flourishing a deadly weapon were sufficient to create a jury issue. Decker, 758 S.W.2d at 63. The Courts of Appeals have reached similar results. See, e.g., Smoote v. Sinclair Oil Corp., 1999 WL 1219882 at *7 (Mo. App. E.D. Dec. 21, 1999), transfer granted, (Mo. banc Apr. 25, 2000) (duty created by six armed robberies, two attempted armed robberies and two assaults); Bowman v. McDonald's Corp.,

916 S.W.2d 270, 277-78 (Mo. App. W.D. 1995) (duty created by evidence of ten prior violent crimes); Becker v. Diamond Parking, Inc., 768 S.W.2d 169, 171 (Mo. App. W.D. 1989) (duty created by one prior assault along with several break-ins); Pickle v. Denny's Restaurant, Inc., 763 S.W.2d 678, 681-82 (Mo. App. W.D. 1988) (jury issue created by evidence of five armed robberies and four assaults); Brown v. National Super Markets, Inc., 731 S.W.2d 291, 293 (Mo. App. E.D. 1987) (jury issue created by evidence of 22 violent crimes).

Based on the authority of Madden, Decker, Smoote, Bowman, Becker, Pickle and Brown, there can be little doubt that plaintiff satisfied her burden in this case. Plaintiff produced crime reports maintained by the Kansas City, Missouri Police Department, and incident reports maintained by the defendants themselves.[8] These police reports and incident reports are located in the record at LF 910-1171, 1209-1252. Although far from a complete list, the following 37 crimes are indisputably violent and occurred within the 25 months prior to the rape of plaintiff (which happened on March 15, 1997).

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[8] Defendants attacked these records below (including their own incident reports) as being hearsay. (LF 1374-75). Any such objection is without merit. Defendants' incident reports are business records, and the Kansas City, Missouri Police Department reports are public records. Even more importantly, the records are not offered for the truth of the matter asserted, but to show that defendants had notice of prior violent crimes occurring on their property. They are clearly admissible for that purpose. Keesee v. Freeman, 772 S.W.2d 663, 669 (Mo. App. W.D. 1989) (police files and incident reports admitted over hearsay objection

1. Assault and Robbery – a female victim, after being assaulted and pushed to the ground during a robbery, "was transported to Research Hospital" by ambulance (3/13/97) (LF 1027-29);
2. Assault and Attempted Armed Robbery – during an attempted robbery a man "pulled a knife on [the victim's] eldest daughter" (3/7/97) (LF 923-24);
3. Armed Robbery – an armed robber jumped into a female victim's van, "put his gun to her neck," and stole her van and purse (2/26/97) (LF 925-26);
4. Robbery – a woman was the victim of a "strong arm" robbery (2/8/97) (LF 961);
5. Armed Robbery – a woman and her mother were robbed by an armed man who grabbed the mother, pointed his gun at her, and said "give me your purse or I'll kill you" (1/15/97) (LF 929-30);
6. Assault – a victim was threatened with a knife (12/2/96) (LF 995-96);
7. Sexual Assault and Battery – a female victim was assaulted by a man who pushed her against her car and said "that he would like to do her" (12/1/96) (LF 1034-35);

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to establish duty); Pickle v. Denny's Restaurant, Inc., 763 S.W.2d 678, 681 (Mo. App. W.D. 1988) (plaintiff allowed "to stand in front of the jury and read police reports word for word").

8. Armed Robbery – an armed robber "produced a handgun and pointed it at the victim and said 'give me your money and your jacket'" (11/22/96) (LF 932-33);

9. Assault – an offender told a victim "shut the fuck up or I'll shoot you" (11/9/96) (LF 997-98);

10. Armed Robbery – an armed robbery was committed at the Dillard's Department Store located in the Mall (10/26/96) (LF 934);

11. Assault – a young man approached a fourteen year old girl, "grabbed her by the neck with his hand and hit her in the mouth" (9/24/96) (LF 1040-44);

12. Armed Robbery – a criminal pushed a gun into the victim's side during an armed robbery (9/23/96) (LF 935-36);

13. Armed Robbery – a woman was threatened by a man claiming to have a gun during a robbery attempt (9/10/96) (LF 1074-75);

14. Armed Robbery – during the armed robbery of a female victim the robber "stuck a handgun in her face" (8/30/96) (LF 937-38);

15. Armed Robbery – a robber used a handgun (8/19/96) (LF 1161-64);

16. Armed Robbery – two women were robbed by a man "holding a small cabiler [sic] pistil [sic] (revolver)" (7/26/96) (LF 966-69);

17. Armed Robbery – an armed robbery was committed at Helzberg's Diamonds in the Mall (6/18/96) (LF 940-41);

18. Sexual Assault – an unknown man grabbed the breast of a female victim as she was walking through a door (6/17/96) (LF 1049-50);

19. Kidnapping and Assault – a female was threatened with a knife and kidnapped (6/1/96) (LF 916-22);

20. Armed Robbery – a woman was robbed by a man armed with a gun (5/15/96) (LF 970-72);

21. Sexual Assault – a female victim was sexually assaulted in a restroom (4/15/96) (LF 416-18);

22. Armed Robbery – a victim was robbed by a man who "pointed a gun in [his] face and yelled 'give me the fucking money or I'll blow your face off'" (3/29/96) (LF 944-45);

23. Assault and Battery – a female victim was beaten inside the Mall (12/2/95) (LF 1085-86);

24. Robbery, Assault and Battery – during a robbery an elderly woman was knocked to the ground, causing a head injury that required stitches (12/1/95) (LF 973-74);

25. Assault and Battery – a female victim was struck in the face by an assailant "so hard that she fell to the floor" (11/7/95) (LF 1022-24);

26. Assault and Battery – a man hit a woman and "put her in a head lock" (10/29/95) (LF 1087-88);

27. Sexual Assault – a fourteen year old girl was sexually assaulted by a man in a movie theater; the man grabbed her thighs, buttocks and

genitals, causing the girl to be "frightened for her life" (9/29/95) (LF 912-15);

28. Armed Robbery – a woman and her mother were robbed at gunpoint (8/16/95) (LF 949-50);

29. Assault and Battery – a woman was attacked by three women, who "hit her numerous times, pushed her to the ground and continued striking her and began to kick her" (8/11/95) (LF 1058);

30. Armed Robbery, Assault and Battery – a woman was injured during an armed robbery when the robbers pushed her to the ground (7/31/95) (LF 977-78);

31. Armed Robbery, Assault and Battery – a victim was sprayed in the face with mace during an armed robbery of Coleman's Jewelry inside the Mall (6/30/95) (LF 951-55);

32. Armed Robbery, Assault and Battery – a victim was assaulted and robbed at knife point, sustaining injuries to his chest and hands (6/12/95) (LF 956-57);

33. Robbery – an elderly woman was robbed in the parking lot (6/10/95) (LF 979-81);

34. Assault and Battery – a young man assaulted a female victim, hitting her "hard enough to make her cry and receive a bruise" (3/27/95) (LF 1067);

35. Assault – a woman was assaulted by a man (3/5/95) (LF 1068-69);

36. Robbery, Assault and Battery – a woman and her aunt were assaulted and robbed near Dillard's; the aunt sustained injuries in the form of "a hurt right shoulder, a broken ring finger on her left hand and a bruised jaw bone on the left side of her face," for which she received medical treatment at St. Joseph's Hospital (2/20/95) (LF 982-83);

37. Robbery, Assault and Battery – a woman was punched in the face during a robbery in the upper parking level (2/19/95) (LF 986-87).

There is no dispute that defendants had knowledge of these 37 prior violent criminal acts, since the descriptions of these acts are taken from defendants' own security reports, which defendants reviewed on a regular basis. Levenberg Depo. at 35:6-22 (LF 735). Indeed, defendants explicitly testified that they were aware of these crimes. Id. at 34:18-35:1 (LF 735). Thus, they can hardly argue on appeal that violent crime was unforeseeable on their property.[9]

[9] Plaintiff does not mean to imply that this list of 37 prior crimes is complete – it is not. The list contains less than one half the relevant crimes occurring at the Ward Parkway Mall during the relevant time period. Plaintiff has composed this shorter list because she anticipates that defendants will, as they did below, attempt to quibble about which crimes should be counted. The crimes on this list all fit with the definition of "violent crime" set forth in Madden, 758 S.W.2d at 62-63 & n.2, and they all occurred within 25 months before plaintiff was raped, a more narrow time frame than the three year period approved by this Court in Madden and Decker. If defendants wish to contest the relevance

The defendants made little effort below to distinguish this case from Madden, Decker, Smoote, Bowman, Becker, Pickle and Brown. Rather, they relied on three cases that had completely different facts than those presented here – Wood v. Centermark Properties, Inc., 984 S.W.2d 517 (Mo. App. E.D. 1998), Knop v. Bi-State Development Agency, 988 S.W.2d 586 (Mo. App. E.D. 1999), and Faheen v. City Parking Corp., 734 S.W.2d 270 (Mo. App. E.D. 1987). (LF 346-351, 648-660). The Wood court found no duty to prevent an abduction (and subsequent murder miles from the premises), but based that finding upon the fact that only one criminal incident was cited by the plaintiff that "suggested the potential use of a weapon," as well as the fact there were no injuries during any incident. Wood, 984 S.W.2d at 524-25. The Wood court emphasized its view that "[i]n the cases where a duty was found, courts have found prior crimes with a high degree of force, usually involving a weapon." Id. at 525. Here the record is replete with incidents involving a high degree of force and/or use of a weapon."[10] In Knop the court simply held that "two armed robberies

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of any particular crimes occurring at their mall, they should start by explaining why each of these 37 crimes should not be counted.

[10] After oral argument before the Court of Appeals, defendants further submitted the case of Hudson v. Riverport Performance Arts Centre, 37 S.W.3d 261 (Mo. App. E.D. 2001), as support for their position. The Hudson case, however, simply did not involve any prior violent crimes. "Out of these assaults, most appeared to be fistfights, elbowing, pushing, kicking, and pulling hair; none of these assaults involved a bottle or other similar object." Id. at 265. In other words, none of the prior crimes submitted by the plaintiff in that case

over a two year period and a strong armed robbery four years earlier were not sufficient" to create a duty. Knop, 988 S.W.2d at 590. As discussed above, there are far more than three prior incidents in this case. And Faheen is even more inapposite. Faheen was a car bombing case and was decided primarily on the fact that a car bombing is almost never foreseeable based upon prior violent street crime. Madden, 758 S.W.2d at 62 n.2. Indeed, the Faheen court did not even specify how many prior criminal incidents were at issue, thus making the case of little use here. Moreover, the "substantial majority" of the prior crimes in Faheen were merely property crimes, and they were not all confined to the property at issue. Faheen, 734 S.W.2d at 271-72, 274. Nothing in Wood, Knop or Faheen suggests that the pattern of violent crime at the Ward Parkway Mall – an average of nearly two violent crimes per month for the two years prior to plaintiff's rape – was too sporadic to place defendants on notice of the need to take reasonable precautions.

The defendants also tried to minimize the level of the crime problem at the Mall by arguing for an "inside/outside" rule. The Mall's owners and managers argued before the Court of Appeals that all prior crimes occurring outside the Mall should be ignored because the location where plaintiff was raped is not "part of the 'outside'" of the Mall, WPSCC Brief at 29, while at the same time the Mall's security company argued that prior crimes occurring inside the Mall should be ignored because plaintiff was raped just

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were violent as defined by Madden and Decker. Plaintiff here, on the other hand, has submitted evidence of dozens of prior violent crimes at the Ward Parkway Mall, each of which is far more severe than the fistfights at issue in Hudson.

outside the Mall's doors. IPC Brief at 19. This Court did not adopt any arbitrary inside/outside distinction in its Madden and Decker cases. The Restatement (Second) of Torts Section 344, upon which this Court relied in adopting the prior violent crimes rule, says nothing about an inside/outside distinction. And plaintiff has been unable to find any case from other jurisdictions following the prior violent crimes rule that has applied such a categorical inside/outside distinction. Defendants' argument lacks authority and should be rejected.[11]

Defendants' entire inside/outside argument is based on their misreading of two cases – Wood v. Centermark Properties, Inc., 984 S.W.2d 517 (Mo. App. E.D. 1998) and Pickle v. Denny's Restaurant, Inc., 763 S.W.2d 678 (Mo. App. W.D. 1988). Contrary to defendants' claims, neither case holds that all prior outdoor crimes must categorically be excluded in a case of indoor crime, or vice versa. In Pickle, the court merely held that the trial court did not abuse its discretion in excluding evidence of four specific prior crimes, some of which occurred inside the restaurant and some of which occurred outside. Pickle, 763 S.W.2d at 681. The court based its ruling on the fact that the plaintiff had already established a duty based on nine other prior crimes, and "the four excluded incidents complained of were merely cumulative and of little, if any, additional probative effect in

[11] As discussed more fully in Section I.B, pp. 59-65, this type of arbitrary distinction is one of the major faults that have led other jurisdictions to abandon the prior violent crimes rule in favor of the emerging balancing approach. See, e.g., McClung v. Delta Square Limited Partnership, 937 S.W.2d 891, 900 (Tenn. 1996).

determining whether or not the incident involving the plaintiff was foreseeable." Id. at 681-82. Similarly, the Wood case merely cited Pickle for the proposition that "on the basis of relevancy, a prior crime that occurs indoors may be excluded where the incident occurs outside." Wood, 984 S.W.2d at 524 (emphasis supplied). The Wood court offered no further discussion of the issue, and certainly gave no indication that it intended to establish a bright-line rule to be used in all cases.

Relevancy, of course, is the most basic requirement for all evidence. All questions of relevancy, however, depend upon the facts of a particular case. Situations may exist where evidence of prior outdoor crimes, such as those occurring in remote parking lots, might not be relevant to show the foreseeability of purely indoor crimes, such as an assault in a restroom. That is not the case here. Prior violent crimes occurring both inside and outside are relevant in this case because the attack on plaintiff began inside the Mall, then moved outside when the assailant carried her to the "Catwalk" area, where he raped her.[12] Defendants maintain both an inside and an outside security patrol of their premises, Coudriet

[12] The Catwalk is not a remote area. Rather, it is located immediately outside the door through which plaintiff was carried and is flush with the building. It is essentially a second story walkway and parking lot with stairs leading down to the ground level. Defendants' own security audit listed the Catwalk as a trouble spot for crime, (LF 892), and defendants' outside patrol was specifically instructed to monitor the Catwalk. Coudriet Depo. at 25:11-18 (LF 772).

Depo. at 30:5-31:6 (LF 773); Viets Depo. at 49:15-25 (LF 827), and by defendants' own admission both the inside patrol and the outside patrol were responsible for the area where the rape occurred:

> Q: Assuming that you don't have an Eagle One or Two on the roof, would it be the outside patrol or the inside patrol which was responsible for the catwalk area?
>
> A: It would be inside and outside. * * *

Coudriet Depo. at 30:5-9 (LF 773). Indeed, plaintiff was raped directly below the "Eagle II" position maintained by the Mall's outside patrol, which should have been manned that night but was not. Plaintiff's rape could have been prevented by either the Mall's indoor security or its outdoor security if either had been doing their job properly on the night of March 15, 1997, and prior violent crimes occurring both indoors and outdoors are therefore relevant to establish defendants' duty in this case to take reasonable security precautions.[13]

[13] In the end, the "inside/outside" issue makes little difference under the facts presented here. As detailed in pp. 43-47, supra, plaintiff has shown 18 specific prior violent crimes occurring outside the Ward Parkway Mall during the 25 months preceding her rape, and 19 specific prior violent crimes occurring inside the Mall during that same time period. Either set of these crimes is sufficient by itself to create a duty in this case. Plaintiff discusses the issue in detail only because the defendants have raised it, and because the Court should clarify the law for future cases.

3. The Prior Violent Crimes at the Ward Parkway Mall Were of the Type to Cause a Reasonable Person to Take Precautions

The third element of the violent crimes rule is qualitative. Plaintiff must show that the prior crimes occurring on the property were of the type that would cause a reasonable person to take precautions. Groce, 925 S.W.2d at 885; Keenan, 784 S.W.2d at 303. "It is not necessary that prior crimes and later offenses be identical, but the nature of the criminal acts must share common elements sufficient to place the business owner on notice of the danger and alert him to the safeguards which are appropriate to the risks." Keesee v. Freeman, 772 S.W.2d 663, 669 (Mo. App. W.D. 1989). This Court has specifically held that "abduction, sexual assault, and even murder committed by use of a firearm should be foreseeable based on [violent] street crimes." Madden, 758 S.W.2d at 62 n.2.

The term "'violent crime" includes "assaults, robberies, murder, rape, things such as that, that require some attempt at bodily harm or bodily harm together with whatever else may have occurred, such as a robbery.'" Knop, 988 S.W.2d at 590 (quoting Brown v. National Super Markets, Inc., 731 S.W.2d 291, 294 (Mo. App. E.D. 1987)); accord Wood, 984 S.W.2d at 524. Crimes classified as "violent" include: (1) armed robbery – Madden, 758 S.W.2d at 62; Decker, 758 S.W.2d at 63; Pickle, 763 S.W.2d at 681; (2) strong arm robbery – Madden, 758 S.W.2d at 62; Wood, 984 S.W.2d at 524; (3) assault and battery – see Madden, 758 S.W.2d at 62; Decker, 758 S.W.2d at 63; Pickle, 763 S.W.2d at 681 and (4) other crimes showing potential danger to human life – Becker, 768 S.W.2d at 169 (female attacked); Decker, 758 S.W.2d at 63 (flourishing deadly weapon). Examples of

crimes that do not count are shoplifting, simple theft, and other purely nonviolent property crimes. Smoote, 1999 WL 1219882 at *7; Keenan, 784 S.W.2d at 303. In general, if a weapon is used or physical injury sustained then the crime is violent. Knop, 988 S.W.2d at 590; Wood, 984 S.W.2d at 524; Brown v. Schnuck Markets, Inc., 973 S.W.2d 530, 534 (Mo. App. E.D. 1998).

Here, as in Madden, plaintiff was the victim of a sexual assault. To establish defendants' duty to take reasonable precautions she offered the very type of evidence approved in Madden – specific prior incidents of violent crime occurring at the Ward Parkway Mall. These prior crimes are all indisputably violent. They involve the very sort of armed robberies, assaults and batteries that were relied upon to create a duty in Madden and Decker, as well as in Smoote, Bowman, Becker, Pickle and Brown. Most involved use of a weapon. Many caused physical injury. None were nonviolent crimes such as shoplifting or theft. These crimes were clearly of the sort that would place a reasonable person on notice of the need to take proper precautions, and defendants therefore had a duty to plaintiff and other Mall patrons to act reasonably in taking such precautions.

In their briefing before the Court of Appeals defendants admitted that plaintiff had produced substantial evidence of prior violent crimes at the Ward Parkway Mall, but argued that they should escape liability because "not a single crime alleged to have occurred in the location of Plaintiff's crime shares common elements with the crime of rape." WPSCC Brief at 15. As a preliminary matter, this argument misstates the record. In fact, a rape was attempted at the Mall in 1992, (LF 880), a sexual assault occurred in a Mall restroom in 1996 (LF 1049-50), and a 14-year-old girl was attacked and molested in 1995.

(LF 912-15). More importantly, however, this Court squarely rejected such an argument in Madden. There, as here, the plaintiff was abducted and sexually assaulted. Madden, 758 S.W.2d at 60. There, as here, the plaintiff pointed to prior incidents of armed robbery, strong arm robbery and assault as putting the defendants on notice of the need to take precautions to prevent future crime. Id. at 62. And this Court explicitly held that a duty was thereby established. Id. at 62-63; accord Decker 758 S.W.2d at 63; Becker, 768 S.W.2d at 171. The Court specifically did not require any evidence of a prior rape. The fact that "only" one rape and two sexual assaults were committed at the Ward Parkway Mall in the five years before plaintiff was raped is therefore irrelevant to the issue of liability.

Essentially, defendants would like to argue that no liability should attach unless an identical crime occurred on the premises shortly before the crime at issue. That is not the law in Missouri or anywhere else. As recently stated by the Mississippi Court of Appeals:

> This premises owner would have us require that an attack almost identical to the one on Mrs. Hogue had previously occurred. Among the necessary details at least implied by American National is that proof be introduced that a car-jacking with a kidnapped victim had earlier occurred. However, the supreme court has held evidence competent to support liability for a kidnapping, car theft, and beating if it showed that crimes against the person had previously occurred on the premises. The key is whether the premises owner was on notice of a

> reasonable risk of assaults on his patrons in the parking lot. The rule of reason is not offense-specific, e.g., no liability to the kidnapped owner of a car until after the first kidnapping; then no liability to a third person hit intentionally by a fleeing felon in a stolen car with a kidnaped owner until after the first such third-person injury.

American Nat'l Ins. Co. v. Hogue, 749 So. 2d 1254, 1260 (Miss. Ct. App. 2000). The same analysis applies here. This Court has held evidence of crimes against the person competent to establish liability for a sexual assault and abduction.[14] Madden, 758 S.W.2d at 62-63; Decker, 758 S.W.2d at 63. The key is whether the premises owner was on notice of a reasonable risk of violent crime on the premises. Becker, 768 S.W.2d at 171. And the rule is not offense-specific. Madden, 758 S.W.2d at 62 (armed robberies, strong arm robberies, an assault and a purse snatching provide notice and impose a duty to protect against abduction and sexual assault); Decker, 758 S.W.2d at 62 (armed robbery, purse snatching

[14] The crime of rape itself is a species of sexual assault, requiring the added showing of "forcible compulsion." R.S.Mo. §§ 566.030, 566.040. In addition to the serious emotional and physical trauma that accompanies all rapes, plaintiff sustained other physical injuries from the assault, such as bruises, cuts and scratches. L.A.C. Depo. at 118:25-119:16 (LF 710). This fact provides further support for including as violent crimes the previous assaults at the Ward Parkway Mall, as well as the previous crimes involving a weapon, bodily harm or an attempt at bodily harm.

and thefts used to provide notice and impose duty against rape and murder); Smoote, 1999 WL 1219882 at *7 (assaults, burglary and stealings used to provide notice and impose duty against armed robbery); Pickle, 763 S.W.2d at 681 (assaults used to provide notice and impose a duty against armed robbery). The defendants here knew of the violent crime problem on their premises, and that knowledge triggered a duty for them to take reasonable precautions to protect their patrons. Whether they satisfied this duty or breached it is a question for the jury.

4. Basic Fairness and Public Policy Require That Defendants Be Held Liable for Their Conduct

The final reason for upholding defendants' duty to take reasonable precautions to protect their patrons is basic fairness and public policy. "'[A]lthough the case law and comments use terms such as 'foreseeability,' 'proximate cause,' and 'intervening cause,' the final resolution of the issue is dictated by basic fairness and public policy.'" Mulligan v. Crescent Plumbing Supply Co., Inc., 845 S.W.2d 589, 591-92 (Mo. App. E.D. 1992) (quoting Faheen v. City Parking Corp., 734 S.W.2d 270, 273 (Mo. App. E.D. 1987)). This inquiry "'involves a weighing of the relationship of the parties, the nature of the risk and the public interest in the proposed solution.'" Faheen, 734 S.W.2d at 273 (quoting Goldberg v. Housing Authority of Newark, 186 A.2d 291, 293 (N.J. 1962)). The facts of this case clearly show that basic fairness and public policy favor imposing a duty on defendants to act reasonably.

This is not a case where a small business has been sued based upon one unpredictable incident of violent crime. The defendants own and manage a major shopping

center, and they know full well that they have a serious violent crime problem on their property. Their corporate officers admitted in depositions that they have a duty to provide protection for the public, and that they thought so at all times relevant to this case. Levenberg Depo. at 42:5-22 (LF 737); Coudriet Depo. at 10:6-14 (LF 768). They know that the public expects to be protected, so they have security guards visible. Breshears Depo. at 32:14-22, 36:2-5 (LF 1486-87); Daise Depo. at 14:15-14:12 (LF 1517). Unfortunately, this so-called "protection" is a mere sham.

The defendants have security guards, but those guards refused to respond to a frantic call for help. Griddine Test. at 39:25-41:23 (LF 1546-48). The defendants know they have a crime problem on the Catwalk (LF 892), but they refused to install closed-circuit television that would have prevented the rape of plaintiff. Levenberg Depo. at 13:6-8 (LF 730). They are supposed to have rooftop guard posts to monitor the Catwalk, but those posts often go unmanned, and were unmanned on the night plaintiff was raped. Viets Depo. at 31:25-32:6 (LF 822). They know that lights are often broken on the Catwalk, and that reduced lighting contributes to crime, but those lights were burned out on March 15, 1997. Daise Depo. at 50:14-17 (1526). They know that an alarm on the door leading to the Catwalk would help prevent crime, but they will not install it. Coudriet Depo at 40:15-20 (LF 775); Swann Depo. at 83:13-24 (LF 807). In short, they entice the public with assurances of security, but in fact provide a dangerous place to visit. And the problem is not getting any better. Indeed, even as they claim to feel sorrow that plaintiff was raped, defendants freely admit that they have done nothing to improve their security measures as a result of that attack. Levenberg Depo. at 52:18-53:5 (LF 739-40).

The bottom line is that the Ward Parkway Mall is already a dangerous place, and its violent crime problem will only keep getting worse until the Circuit Court's decision is overturned. Who is in the better position to appreciate the nature of the crime risks at the Ward Parkway Mall, the defendants or a twelve-year-old girl? Who is in a better position to prevent those crimes? How much – or more accurately, how little – would it cost to prevent those crimes? How easy would it be to insist that the security guards answer all calls for help? How easy would it be to man the rooftop observation posts on all busy weekend nights, rather than letting guard stations go unmanned? How easily could the known crime problem on the Catwalk be corrected by installation of a door alarm or closed circuit television, increased patrols or simply maintaining proper lighting? The defendants, of course, may argue that they acted reasonably, but that is a question for the jury. Madden, 758 S.W.2d at 63. For now the only question is whether, on March 15, 1997, the defendants were on notice that their patrons might be subject to criminal attacks by third persons. Id. at 62. The record clearly shows that they were.

B. The Court Should Revisit the Prior Violent Crimes Approach to Foreseeability Adopted in Madden and Decker and Replace It with the Balancing Approach That Is Emerging in Other Jurisdictions

For the reasons discussed above, the Mall's owners and managers clearly owed a duty to plaintiff under the prior violent crimes rule adopted by this Court in Madden and Decker because the history of violent crime at the Mall made future crimes foreseeable. But the Court's inquiry should not end with that determination. This Court has not reviewed a case involving the duty of business owners to protect their customers from criminal attack

in the thirteen years since Madden and Decker were decided. During that time period the prior violent crimes rule has come under severe attack in other jurisdictions for leading to arbitrary results and violating the public policy of preventing future harm. McClung v. Delta Square Limited Partnership, 937 S.W.2d 891, 899-900 (Tenn. 1996); accord Delta Tau Delta v. Johnson, 712 N.E.2d 968, 972 (Ind. 1999); Seibert v. Vic Regnier Builders, Inc., 856 P.2d 1332, 1339 (Kan. 1993); Doud v. Las Vegas Hilton Corp., 864 P.2d 796, 800 (Nev. 1993). Those criticisms are well justified. As this Court itself stated in Madden, "[t]he touchstone for the creation of a duty is foreseeability." Madden, 758 S.W.2d at 62. But future crime on a particular property can be foreseeable even absent a showing of specific instances of prior violent crime on that property. Other factors, such as the nature, character and location of a business are also relevant. Focusing solely on prior incidents of crime causes both arbitrary results and confusion in the lower courts. The Court should therefore revisit the prior violent crimes approach to foreseeability adopted in Madden and Decker and replace it with the "balancing approach" that is emerging in other jurisdictions. Posecai v. Wal-Mart Stores, Inc., 752 So. 2d 762, 768 (La. 1999); McClung, 937 S.W.2d at 902-03; Ann M. v. Pacific Plaza Shopping Center, 863 P.2d 207, 215 (Cal. 1993).

1. The Balancing Approach to Foreseeability Is an Emerging Trend in the Law That Retains the Benefits of the Prior Violent Crimes Rule and the Totality of the Circumstances Test While Avoiding Problems Associated with Each of Those Standards

Case law regarding a business owner's duty to protect customers from criminal attacks has evolved repeatedly over the past thirty years, as summarized succinctly

in McClung, 937 S.W.2d at 897-901. In the early cases courts generally denied recovery under the theory that a business owed no duty to its patrons. See, e.g., Davis v. Allied Supermarkets, Inc., 547 P.2d 963, 964 (Okla. 1976); Cook v. Safeway Stores, Inc., 354 A.2d 507, 509 (D.C. 1976); Nigido v. First Nat'l Bank of Baltimore, 288 A.2d 127, 129-30 (Md. 1972). The reasons given for declining to impose a duty included the unpredictable nature of criminal conduct, Goldberg v. Housing Authority of Newark, 186 A.2d 291, 297 (N.J. 1962); fear of creating an undue burden upon commercial enterprise and the consuming public, Nappier v. Kincade, 666 S.W.2d 858, 860 (Mo. App. E.D. 1984); the belief that protecting citizens is a function of government, not the private sector, id.; the desire that merchants not be insurers of customer safety, Shaner v. Tuscon Airport Authority, Inc., 573 P.2d 518, 522 (Ariz. App. 1977); and the notion that a criminal's act constitutes a superceding, intervening cause that breaks the chain of liability, Ford v. Monroe, 559 S.W.2d 759, 762 (Mo. App. 1977).

This general no-duty rule was supplanted by Section 344 of the Restatement (Second) of Torts. Under Section 344, and particularly Comment f to that section, a business is not an insurer of its customers' safety, but it does have a duty to take reasonable precautions to protect customers from foreseeable criminal acts. In the years following its publication the vast majority of jurisdictions adopted the Restatement approach, including this Court in its Madden and Decker decisions. Madden, 758 S.W.2d at 62.

After the Restatement approach was adopted, however, courts did not agree on the method for showing that crime was foreseeable on a particular property. Early jurisdictions to adopt the Restatement approach, including Missouri, utilized the prior violent

crimes rule, whereby foreseeability could be established only by showing specific prior crimes on or near the defendant's premises. See, e.g., Madden, 758 S.W.2d at 62-63; Groce, 925 S.W.2d at 885 (following Madden). The prior violent crimes rule quickly led to problems, however, and has since been labeled as "fatally flawed" in the following respects:

> First, the rule leads to results which are contrary to public policy. The rule has the effect of discouraging landowners from taking adequate measures to protect premises which they know are dangerous. This result contravenes the policy of preventing future harm. Moreover, under the rule, the first victim always loses, while subsequent victims are permitted recovery. Such a result is not only unfair, but it is inimical to the important policy of compensating injured parties. Surely, a landowner should not get one free assault before he can be held liable for criminal acts which occur on his property.
>
> Second, a rule which limits evidence of foreseeability to prior similar criminal acts leads to arbitrary results and distinctions. Under this rule, there is uncertainty as to how "similar" the prior incidents must be to satisfy the rule. The rule raises a number of other troubling questions. For example, how close in time do the prior incidents have to be? How near in location must they be? The rule invites different courts to enunciate different standards of foreseeability based on their resolution of these questions.

> Third, the rule erroneously equates foreseeability of a particular act with previous occurrences of similar acts . . . . "[T]he fortuitous absence of prior injury does not justify relieving defendant from responsibility for the foreseeable consequences of its acts."
>
> Finally, the "prior similar incidents rule" improperly removes too many cases from the jury's consideration. It is well-established that foreseeability is ordinarily a question of fact.

McClung v. Delta Square Limited Partnership, 937 S.W.2d 891, 899-900 (Tenn. 1996) (quoting Isaacs v. Huntington Memorial Hospital, 695 P.2d 658-59 (Cal. 1985)); see also Delta Tau Delta v. Johnson, 712 N.E.2d 968, 972 (Ind. 1999); Seibert v. Vic Regnier Builders, Inc., 856 P.2d 1332, 1339 (Kan. 1993); Doud v. Las Vegas Hilton Corp., 864 P.2d 796, 800 (Nev. 1993).

As a result of these criticisms, a number of jurisdictions rejected the prior violent crimes rule in favor of a "totality of the circumstances" approach to foreseeability. See, e.g., Delta Tau Delta, 712 N.E.2d at 973; Clohesy v. Food Circus Supermarkets, 694 A.2d 1017, 1027 (N.J. 1997); Seibert, 856 P.2d at 1339. This test still considers prior incidents of crime on a property, but takes additional factors into account in determining foreseeability, such as the nature, condition and location of the land, as well as any other relevant factual circumstances. Delta Tau Delta, 712 N.E.2d at 972; Krier v. Safeway Stores 46, Inc., 943 P.2d 405, 414 (Wyo. 1997). "The application of this test often focuses on the level of crime in the surrounding area and courts that apply this test are more willing to see property crimes or minor offenses as precursors to more violent crimes." Posecai, 752 So.

2d at 767 (citing Clohesy, 694 A.2d at 1028). Although it addresses the defects associated with the prior violent crimes rule, the totality of the circumstances approach has itself been criticized "as being too broad a standard, effectively imposing an unqualified duty to protect customers in areas experiencing any significant level of criminal activity." McClung, 937 S.W.2d at 900; accord Posecai, 752 So. 2d at 767.

In response to the perceived unfairness of both the prior violent crimes rule and the totality of the circumstances approach, three jurisdictions – Tennessee, Louisiana and California – have adopted a balancing test. McClung, 937 S.W.2d at 902-03; Posecai, 752 So. 2d at 768; Ann M. v. Pacific Plaza Shopping Center, 863 P.2d 207, 215 (Cal. 1993). "This approach retains some beneficial features of both the [prior violent crimes] and totality of the circumstances tests, but avoids some of the problems associated with each." McClung, 937 S.W.2d at 901. In essence, the test balances "the foreseeability of harm and the gravity of harm" against "the commensurate burden imposed on business to protect against that harm." Id. at 902; Posecai, 752 So. 2d at 768; Ann M, 863 P.2d at 215. "In cases in which there is a high degree of foreseeability of harm and the probable harm is great, the burden imposed upon defendant may be substantial. Alternatively, in cases in which a lesser degree of foreseeability is present or the potential harm is slight, less onerous burdens may be imposed." McClung, 937 S.W.2d at 902. For example, "[a] very high degree of foreseeability is required to give rise to a duty to post security guards, but a lower degree of foreseeability may support a duty to implement lesser security measures such as using surveillance cameras, installing improved lighting or fencing, or trimming shrubbery." Posecai, 752 So. 2d at 768.

This Court should adopt the balancing approach to foreseeability over the prior violent crimes rule for several reasons. First, the balancing approach will eliminate all the problems associated with the prior violent crimes rule, such as discouraging businesses from taking adequate measures to protect premises that they know are dangerous, while at the same time keeping the cost and burden on those businesses to a minimum. Second, the balancing approach is fully consistent with general Missouri tort principles. The Missouri courts have long held that "[i]n considering whether a duty exists in a particular case, court[s] must weigh the foreseeability of injury, likelihood of injury, magnitude of burden of guarding against it and consequences of placing that burden on defendant." Lockwood v. Jackson County, 951 S.W.2d 354, 357 (Mo. App. W.D. 1997); accord Hosto v. Union Electric Co., 51 S.W.3d 133, 139 (Mo. App. E.D. 2001); Benoit v. Missouri Highway & Transp. Comm'n, 33 S.W.3d 663, 668 (Mo. App. S.D. 2000). That is exactly what the balancing test does, in a way that is fair both to businesses and to consumers. And third, adopting the balancing approach will eliminate the problems sometimes experienced by the Courts of Appeals under the Madden rule, such as determining how close in time the prior crimes must be, how similar the prior crimes must be to the crime at issue, and how near in location the prior crimes must be to the crime at issue.

In short, the balancing approach to foreseeability provides the fairest and most equitable results. It creates a duty in limited circumstances, neither giving merchants absolute immunity nor imposing absolute liability. It recognizes the national trend that businesses must justifiably expect to share in the cost of crime attracted to the business. And it encourages a reasonable response to the crime phenomenon without making unreasonable

demands. McClung, 937 S.W.2d at 902. For all of these reasons, the Court should revisit the prior violent crimes approach to foreseeability used in Madden and Decker and replace it with the balancing approach that has been adopted by the California, Tennessee and Louisiana Supreme Courts.

2. The Owners and Managers of the Ward Parkway Mall Had a Duty to Provide Full Security Because They Knew That Violent Crime Was a Recurring Problem at Their Mall and the Probability of Serious Harm to Their Customers Was Great

Application of the balancing approach to this case is straightforward. First, violent crime was highly foreseeable at the Ward Parkway Mall. The Mall's own internal security reports show that in the four years prior to plaintiff's rape there were 41 reported robberies at the Mall (both armed and strong arm), 65 assaults and batteries, a kidnapping, a sexual assault, and a sexual attack on a fourteen year old girl. (LF 848, 868, 880, 1178, 1181, 1186). The Mall's own Security Audit warned that the rate of crime directed against the person had doubled at the Mall from 1994 through 1995, and identified the Mall's "Catwalk" – the area where plaintiff was raped – as an area of particular concern. (LF 884-92). The Mall's own tenants warned the managers and owners that the Mall was "dangerous and gang ridden," suffering from "frequent assaults, armed robberies of stores and shoppers, car thefts, vandalism, and an alarming rate of shoplifting." (LF 881-82). And the Mall's own corporate representatives and security guards admitted in their depositions that the Mall hired security precisely to prevent further crimes from occurring. Lantz Depo. at 58:8-18

(LF 1445); Coudriet Depo. at 10:6-10 (LF 768); Daise Depo. at 35:8-10 (LF 1522); Levenberg Depo. at 42:1-4 (LF 737).

Second, the probable harm caused by the continuing pattern of violent crime at the Ward Parkway Mall was great. Dozens of the crimes listed in the Mall's security reports involved deadly weapons and/or violent attacks. People have been robbed at gunpoint at the Ward Parkway Mall. Women have been sexually assaulted at the Ward Parkway Mall. People have been beaten at the Ward Parkway Mall. This pattern was allowed to continue for several years. It was only a matter of time until someone was raped or killed. The fact that the Mall's patrons were lucky enough to escape catastrophic injury until the time plaintiff was raped in no way relieves the Mall's owners and managers of responsibility for the foreseeable consequences of their failure to address the known crime problem at the Mall.

Third, the burden to be imposed on the defendants is relatively slight. Plaintiff is not asking that the Mall guarantee either her safety or the safety of other Mall patrons. She simply asks that the Mall take a few low-cost steps that common sense dictates should be followed. The Mall should instruct and train its existing security guards to respond to calls for help. The Mall should follow the lead of similar shopping centers around the country and install closed-circuit television in the areas it knows to be particular trouble spots for crime. The Mall should replace its lights when they burn out, and place an inexpensive alarm on the door leading to the Catwalk, as its own security officers have recommended. And the Mall should ensure that its existing security force appears each night

in the proper numbers, so that key security posts do not go unmanned. None of these steps would be expensive, especially to a business the size of the Ward Parkway Mall.

In sum, the foreseeability of crime at the Ward Parkway Mall was high, the probable harm to the Mall's patrons was great, and the burden imposed on the Mall's owners and managers in requiring them to address this known crime problem is minor. The owners and managers of the Mall therefore owed a duty to their patrons, including plaintiff, and the case should be remanded for the jury's determination of whether they breached that duty.

Point 2

The Circuit Court erred in granting judgment on the pleadings in favor of defendant IPC on plaintiff's negligence claim because IPC assumed a duty in tort to Mall patrons such as plaintiff when it contracted to provide security services at the Ward Parkway Mall, in that plaintiff alleged sufficient facts in her Third Amended Petition to establish that IPC had assumed a duty to Mall patrons under that contract, and in that plaintiff produced evidence in support of her allegations, in the form of the contract language itself, IPC's Policies and Procedures Manual (which was part of the contract) and the testimony of IPC's security guards, all showing that IPC agreed under its contract to assume responsibility for providing security at the Mall, including the responsibility to determine proper staffing levels, and that the company knew or should have known that its failure to provide such security and/or determine proper staffing levels would likely result in injury to third persons such as plaintiff.

II. Defendant IPC Assumed a Duty of Care When It Contracted to Provide Security at the Ward Parkway Mall, and the Company is Liable for Its Failure to Exercise Reasonable Care in That Undertaking

In addition to its claim against the defendants who owned and managed the Ward Parkway Mall, plaintiff also asserted a cause of action for negligence against IPC, the company hired to provide security at the Mall. (LF 1850-55). As with the other defendants, there is no dispute that plaintiff has produced sufficient evidence of breach, causation and injury against IPC to submit her case to a jury. Rather, the issue is whether IPC owed any duty in tort to plaintiff. IPC did owe a duty to plaintiff in this case, because it specifically contracted to provide security services which, if left undone, would cause injury to third persons such as plaintiff.

It is well settled in Missouri that, as a general proposition, tort liability may be predicated on the breach of a duty assumed by contract. See, e.g., Westerhold v. Carroll, 419 S.W.2d 73, 80 (Mo. 1967); Helm v. Inter-Insurance Exchange for Auto. Club of Mo., 192 S.W.2d 417, 420 (Mo. 1946); Lowery v. Kansas City, 85 S.W.2d 104, 110 (Mo. 1935). It is equally well settled that a person can assume, under a contract to which he or she is a party, a duty to a person who is not a party to that contract. See, e.g., Westerhold, 419 S.W.2d at 80; Wolfmeyer v. Otis Elevator Co., 262 S.W.2d 18, 22 (Mo. 1953); Lambert v. Jones, 98 S.W.2d 752, 758 (Mo. 1936). In particular, this Court has held that:

> where one under contract with another assumes responsibility for property or instrumentalities and agrees under his contract to do certain things in connection therewith which, if left

> undone, would likely injure third persons, "there seems to be no good reason why (he) should not be held liable to third persons injured thereby for his failure to do that which he agreed to do, which he assumed responsibility for, and which was reasonably necessary to be done for their protection."

Westerhold, 419 S.W.2d at 80 (quoting Lambert, 98 S.W.2d at 758); accord Chubb Group of Ins. Cos. v. C.F. Murphy & Assocs, Inc., 656 S.W.2d 766, 774 (Mo. App. W.D. 1983) (quoting same); Howell v. Welders Products & Services, Inc., 627 S.W.2d 311, 313 (Mo. App. W.D. 1981) ("where a defendant undertakes to perform a contract, he must exercise reasonable care for the safety of others and perform his duty skillfully, carefully, diligently and in a workmanlike manner").

This Court has identified six factors that must be considered in determining whether a defendant assumed by contract a duty of care to third persons:

> "the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to defendant's conduct, and the policy of preventing future harm."

Westerhold v. Carroll, 419 S.W.2d 73, 81 (Mo. 1967) (quoting Biakanja v. Irving, 320 P.2d 16, 19 (Cal. 1958)). This test has been used in Missouri and in other jurisdictions to allow third parties to recover against a wide variety of persons negligently performing their

contractual duties, including architects, attorneys, construction companies, engineers, funeral home operators, notaries and security companies. See, e.g., Donahue v. Shughart, Thomson & Kilroy, P.C., 900 S.W.2d 624, 627 (Mo. banc 1995) (attorneys); Holshouser v. Shaner Hotel Group Properties One Limited Partnership, 518 S.E.2d 17, 22 (N.C. App. 1999) (security companies); Contreraz v. Michelotti-Sawyers, 896 P.2d 1118, 1122 (Mont. 1995) (funeral home operators); Colbert v. B.F. Carvin Construction Co., 600 So. 2d 719, 725 (La. App. 1992) (architects); Berkel & Co. Contractors, Inc. v. Providence Hospital, 454 So. 2d 496, 502-03 (Ala. 1984) (construction companies); Rhodes-Haverty Partnership v. Robert & Co. Associates, 293 S.E.2d 876, 878 (Ga. App. 1982) (architects and engineers); Biakanja v. Irving, 320 P.2d 16, 19 (Cal. 1958) (notaries).

Each one of the six Westerhold factors favors plaintiff in this case. Applying the first factor, there is no doubt that the contract between IPC and the Mall defendants was intended to affect plaintiff and the Mall's other patrons. The stated purpose of the agreement was for IPC to provide security at the Ward Parkway Mall. Security Agreement at I.1 (LF 1657). The agreement required IPC to perform all general security duties at the Mall, including making frequent, random rounds of the premises, reporting immediately all suspicious or criminal activities, detaining individuals when necessary to protect mall customers or employees, and determining the staffing level necessary to provide "full and adequate security" at the Mall. Security Agreement at I.3, VI.5 (LF 1657-59, 1666). IPC was also required to provide its services in conformance with a "Policies and Procedures Manual," id. at I.3.J (LF 1573), which offers a telling description of the parties' purpose in making the contract:

> The ultimate goal of any successful shopping center Owner, Developer or Manager is the continued patronage of customers to the mall. In each Center, Mall Management endeavors to create a safe, orderly atmosphere in which customers may relax and shop without undue concern for their own safety. In order to sustain and insure this possible atmosphere, the management of [Ward Parkway Mall] has retained the services of IPC International Corporation to provide Mall Public Safety Services.

Mall Public Safety Services Policies and Procedures Manual at I. (LF 1736). The security contract further required that all IPC personnel be trained according to a specified program. Security Agreement at IV.1-3 (LF 1664). The training guide from this program further explains the reason why the parties entered into that contract:

> Our clients are most concerned with the well being of visitors, customers and employees of the shopping center. It is for this reason that Public Safety Personnel are present. Our client understands their responsibility to the public to provide a safe, orderly environment for shoppers and employees alike.

(LF 1739). The training guide then goes on to warn IPC personnel of the risk of sexual assaults at the Mall, and discusses how such assaults can be prevented. (LF 1738).

Still further evidence of the parties' intent is supplied by the deposition testimony of IPC's representatives and employees. Donald Lantz, IPC's executive vice-

president and co-owner, testified that one of IPC's objectives at a shopping mall was to deter and prevent crime. Lantz Depo. at 58:8-18 (LF 1445). Similarly, Jerry Coudriet, an IPC security officer at the Ward Parkway Mall, testified that it was his understanding that he was hired to protect the Mall's customers. Coudriet Depo. at 10:6-10 (LF 768). And Dan Viets, a former IPC security officer, testified that his job in patrolling the Mall was to protect its customers as best he could. Viets Depo. at 18:11-15 (LF 819). Thus, based on IPC's contract, the documents incorporated by reference into that contract, and the testimony of IPC's representatives and employees, it is clear that the contract between IPC and the Mall defendants was intended to affect plaintiff and the Mall's other patrons.

The second factor, whether harm to a patron was foreseeable, also favors plaintiff. As discussed above, IPC's own security reports show that it was aware of dozens of prior crimes at the Ward Parkway Mall in the months before plaintiff was raped. (LF 848, 868, 880, 1178, 1181, 1186). Mr. Coudriet testified that he knew "at anytime at anyplace of the mall there's a likelihood of a sexual assault occurring," Coudriet Depo. at 19:17-22 (LF 770), and agreed with the Mall's own Security Audit in finding that the catwalk area needed constant patrols due to the high level of incidents there. Id. at 25:11-21 (LF 772). Mr. Lantz admitted that IPC knows of the need to be constantly vigilant in all areas of the Mall to protect against rape. Lantz Depo. at 58:8-18 (LF 1445). And Nathan Swann, another former IPC officer, agreed that he actually foresaw the possibility of sexual assaults or rapes occurring at the Mall. Swann Depo. at 21:5-22:2 (LF 792). Thus, the possibility of harm to Mall patrons if IPC did not perform its security services was not only foreseeable, it was actually anticipated by IPC and its staff.

As for the third factor, there is no doubt whatsoever that plaintiff has suffered injury. She was abducted and raped, suffering the obvious physical and emotional trauma associated with that experience. She underwent years of counseling as a result of the attack. L.A.C. Depo. at 123:1-124:22 (LF 710-11). She also sustained cuts, scratches and bruises to her body that required medical treatment. Id. at 119:25-120:2 (LF 710).

The fourth factor, the closeness of the connection between the defendant's conduct and the injury suffered, also favors a finding of a duty owed by IPC. Plaintiff has produced compelling evidence that IPC's security lapses led directly to her rape. First and foremost, plaintiff's friend, Alicia Griddine, testified that she told two different IPC guards that plaintiff had been abducted and carried outside, but neither IPC guard responded to the plea for help. Griddine Test. at 39:25-41:23 (LF 1546-48). IPC also knew that the Catwalk was a problem area for crime, Coudriet Depo. at 25:11-21 (LF 772), and knew that closed circuit television and a door alarm would help address that problem. Id. at 45:21-46:19 (LF 777). Yet the company did nothing, thus allowing plaintiff to be carried outside without detection. And IPC knew that proper lighting was important to help stop crime, but allowed all of the lights over the area where plaintiff was raped to be burned out. Daise Depo. at 50:14-17 (LF 1526).[15]

[15] IPC's contract specifically required it to "[m]ake frequent . . . rounds of the premises" to perform a variety of duties, including "checking gates, doors, windows, and lights." Security Agreement at I.3.A (LF 1657).

IPC was also negligent in determining the staffing level needed to provide "full and adequate security" at the Mall – a determination for which IPC alone was responsible. Under Section VI.5 of IPC's contract, the company was required to:

> agree upon the proper level of staffing needed to provide adequate security to mall. Upon agreement, the staffing level shall be conclusively deemed for all purposes to be a material representation by Contractor to Manager that the staffing level is one which will provide full and adequate security to the Mall.

Security Agreement at VI.5 (LF 1666). However, as discussed at p. 21 in the Statement of Facts, the staffing level at the Mall was not adequate on the night plaintiff was raped. Because there were too few guards the "Eagle Two" rooftop position was not manned. Coudriet Depo. at 28:16-25 (LF 772). This allowed the rape to occur, because the Eagle Two position has "total access, total view" to the Catwalk where plaintiff was raped, Coudriet Depo. at 27:3-8 (LF 772), and a guard in the Eagle Two position is "the patrol person who would be in the best possible position to prevent a crime from occurring in [that area]." Id. at 32:14-23 (LF 773). IPC's own security guards testified that having more officers on duty would have been beneficial, because that would have allowed the Eagle Two position to be manned every Friday and Saturday night. Coudriet Depo. at 35:8-17 (LF 774); Swann Depo. at 97:8-18 (LF 811). IPC knew that it had assumed these duties under its contract, and it knew that if it failed to perform these duties properly injuries to Mall patrons would likely result. Plaintiff's rape was a direct result of IPC's manifest neglect in providing the security services that it had promised.

The moral blame attached to IPC's conduct, the fifth factor, is also great. As discussed above, the Mall defendants wished to provide security for their patrons because they knew no one would visit their Mall if they thought there was a substantial danger of criminal attack. IPC knew this fact, and knew it had been hired specifically to provide protection against such criminal attacks. But IPC carried out its duties carelessly. Most egregiously, two IPC guards ignored direct requests for help from plaintiff's friend. Under these circumstances, which led to the abduction and rape of a twelve-year old girl, the moral blame attached by society is great.

Finally, as to the sixth factor, IPC has already shown that it will not change its conduct and improve security unless a duty is imposed and liability is found. The Catwalk area is still the same as the night of plaintiff's rape. Coudriet Depo. at 62:15-18 (LF 781); Swann Depo. at 84:13-84:8 (LF 807). IPC has not modified any of its procedures or "do[ne] anything at all different in response to this rape." Breshears Depo. at 96:20-24 (LF 1502). IPC's Director of Security testified that he never thought about how security might be improved after the rape. Id. at 88:19-89:3 (LF 1500). And no alarm has been placed on the door leading outside to the catwalk. Daise Depo. at 52:3-12 (LF 1526). No additional security steps of any kind have been taken in response to plaintiff's rape. Levenberg Depo. at 52:18-53:5 (LF 739-40). Public policy favors imposing a duty on IPC so that it and other similar security companies will perform their contractual obligations properly in the future.

The sole Missouri court to consider the issue has explicitly held that a security company may assume a duty to the public by contracting to provide security services.

Brown v. National Super Markets, Inc., 679 S.W.2d 307, 309 (Mo. App. E.D. 1984).[16] In Brown the plaintiff was shot and seriously injured while in a store's parking lot. As a result

[16] Although not directly on point, the case of Wolfmeyer v. Otis Elevator Co., 262 S.W.2d 18 (Mo. 1953), is also instructive in showing how these types of cases should be analyzed. In Wolfmeyer, the plaintiff was injured when he fell into an elevator shaft. His fall was caused by the fact that there was no interlocking device to prevent the shaftway gate from being raised when the elevator car was not present. Id. at 19. As a result he sued both the building owner and the company which had contracted to provide maintenance for the elevator. With regard to the maintenance company, the Court stated that "whatever it was defendant undertook to do which it knew or should have known or foreseen would affect plaintiff's safety, the defendant had a duty to do it carefully." Id. at 22. The Court further stated that examination of the contract signed by the maintenance company was critical "because it shows what defendant undertook to do." Id. at 21. Ultimately, the Court ruled in favor of the maintenance company because it found that the company had not undertaken to make recommendations for improving the elevator, but only to maintain the elevator in its existing state. Id. at 23. The Court contrasted that situation with the one presented in Dobson v. Otis Elevator Co., 26 S.W.2d 942, 943-44 (Mo. 1930), where the same company was held liable because it had "brought about the very conditions which made the elevator unsafe." Wolfmeyer, 262 S.W.2d at 24. Plaintiff here is simply asking this Court to apply the same analysis to IPC – to look at IPC's contract and the surrounding evidence, determine

she filed suit against the store and the company that the store had hired to provide security. Id. at 308. The trial court granted summary judgment in favor of both defendants, but the Court of Appeals reversed that judgment. Although not explicitly applying this Court's Westerhold analysis, the court held that the security company "may or may not have assumed such a duty [to protect store patrons from crime] when it entered into the security contract. The existence of a duty will turn on the terms of the contract and the circumstances." Id. at 309 (citation omitted). Because the terms of the security contract were not in evidence, the court remanded for further proceedings. As discussed above, the security contract here and the circumstances surrounding its formation clearly show that IPC assumed a duty to protect Mall patrons such as plaintiff.

Cases in other jurisdictions are also in accord. In Holshouser v. Shaner Hotel Group Properties One Limited Partnership, 518 S.E.2d 17 (N.C. Ct. App. 1999), for example, the plaintiff was raped because the defendant security company failed to deliver its promised services. The plaintiff sued the security company, alleging that it had been hired precisely to prevent such crimes, and the Holshouser court upheld that cause of action.

The court began its analysis by citing to the basic principle of tort law adopted in Westerhold and the other cases discussed above:

> Under certain circumstances, one who undertakes to render services to another which he should recognize as necessary for

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what IPC undertook to do by that contract, and hold the company liable for its failure to perform that undertaking carefully.

> the protection of a third person, or his property, is subject to liability to the third person, for injuries resulting from his failure to exercise reasonable care in such undertaking.

Id. at 22 (quoting Condominium Assn. v. Scholz Co., 268 S.E.2d 12, 15 (N.C. Ct. App. 1980)). The court then examined the security contract at issue to determine what duties the defendant security company had assumed. The court noted that the contract required the defendant company to provide guards during designated hours and to render such services "in conformity with operating policies and procedures mutually agreed upon" between itself and the landowner. Id. at 23. The court also considered the defendant's "Security Procedures Manual" as evidencing the operating policies and procedures agreed upon by the parties, id. at 24, and further considered testimony by the defendant's security guards that they were hired "to preserve the peace, protect life and property, and prevent crime." Id. Based upon all of this evidence, the court concluded that the plaintiff had produced sufficient evidence "to raise issues of material fact on the questions of whether there exists a duty to protect plaintiff under the contract and whether this duty was performed in a negligent manner." Id.

All of the evidence relied upon by the Holshouser court is present in this case. Plaintiff has produced the security contract between IPC and the Mall defendants, which requires IPC to perform security services at the Ward Parkway Mall. (LF 1571-81). The contract specifically incorporates a "Policies and Procedures Manual," including the "Manager's instructions to CONTRACTOR and a copy of Manager's Safety Regulations." Security Agreement at I.3.J (LF 1659). The contract further mandates that "CONTRACTOR

[IPC] and its employees shall be familiar with and will adhere to those instructions and regulations at all times." Id. IPC's Policy and Procedures Manual in turn specifically states that the purpose of IPC's services is to protect the Mall's patrons, such as plaintiff. (LF 1736). IPC's guards testified that IPC hired them to protect the public and prevent crime at the Mall. Coudriet Depo. at 10:6-14 (LF 768); Viets Depo. at 18:2-15 (LF 819). And, as discussed above, IPC's contract specifically required the company to determine the proper level of staffing needed to provide adequate security to the Mall. Security Agreement at VI.5 (LF 1666). As demonstrated by Holshouser, this evidence is more than sufficient to support a finding that IPC undertook a duty to provide security at the Ward Parkway Mall, but then breached that duty by performing it in a negligent manner.

Another similar situation was presented in Professional Sports, Inc. v. Gillette Security, Inc., 766 P.2d 91 (Ariz. Ct. App. 1988). There the defendant security company was hired by a minor league baseball team "to patrol and secure the stadium premises." Id. at 94. The team specifically instructed the defendant's guards "to police the concessions where beer was sold, check for underage drinkers, control the crowd (including patrons who became drunk and unruly), and to take whatever action was necessary to maintain the peace on the premises." Id. In violation of these instructions, the guards allowed an underage boy to purchase so much alcohol that he became drunk and was hit by a car outside the stadium. Id. at 92. The court upheld the security company's liability for the boy's injuries, stating that because the company had undertaken to provide security at the stadium, including the detection and prevention of underaged drinking, "reasonable minds could not differ that [the security company] had a duty to exercise due care for the benefit of third parties like

[plaintiff]." Id. at 95. Again, the same analysis is directly applicable to the present case – IPC contracted to provide security services at the Ward Parkway Mall, and it thereby undertook a duty to exercise reasonable care for the benefit of the Mall's patrons, such as plaintiff.

IPC has repeatedly avoided any discussion concerning the terms of its contract (or any of plaintiff's other evidence) in evaluating the duty issue. Rather, IPC simply claims that it cannot "assume a duty that does not exist." (LF 1698). Of course the Mall defendants here did have a duty to plaintiff, for the reasons discussed in pp. 36-68. However, whether those defendants had a duty or not is completely irrelevant to the question of whether IPC assumed a duty when it contracted to provide security services at the Mall (and accepted payment for doing so). "Contracting parties are entirely capable of assuming duties toward one another beyond those imposed by general law and, in fact, do so in nearly every contractual arrangement. It follows that those authorities which define the duties imposed by general law do not restrict the enforcement of additional duties assumed by contract." Richmond Medical Supply Co., Inc. v. Clifton, 369 S.E.2d 407, 409 (Va. 1988). IPC's duty with respect to this claim is governed completely by the terms of its own contract. The company undertook to provide security services, and it should not be allowed to escape liability for its failure to do so carefully, and for thereby bringing about the very conditions that made the Mall unsafe.

In the end, as the Gillette court observed, "[n]o better general statement can be made than that the court will find a duty where, in general, reasonable persons would recognize it and agree that it exists." Gillette, 766 P.2d at 95 (quoting W. Prosser & W.

Keeton, The Law of Torts § 53, at 359 (5th ed. 1984) (internal quotation omitted)).[17] Surely "[r]easonable persons would agree that security guards who undertake for hire to patrol a [shopping mall] have a duty to exercise due care for the protection not only of the [mall], but of the [mall's] patrons." Id.

Point 3

The Circuit Court erred in granting judgment on the pleadings in favor of defendant IPC on plaintiff's breach of contract claim because there was a disputed issue of fact as to whether plaintiff was a third party beneficiary to IPC's contract with the Ward Parkway Mall to provide security services, in that plaintiff alleged sufficient facts in her Third Amended Petition to establish that she was a third party beneficiary to that contract, and in that plaintiff produced evidence in support of her allegations in the form of the contract language itself (including IPC's Policies and Procedures Manual and Training Guide, which were part of the contract), as well as testimony by the parties' corporate representatives, the Mall manager, and IPC's security guards, all showing that the purpose of the security contract and the intent of the parties in hiring IPC was to protect Mall patrons such as plaintiff.

[17] The Missouri courts have cited Prosser & Keeton Section 53 with approval. See, e.g., Hoover's Dairy, Inc. v. Mid-America Dairymen, Inc., 700 S.W.2d 426, 432 (Mo. banc 1985); Hyde v. City of Columbia, 637 S.W.2d 251, 257 (Mo. App. W.D. 1982).

III. Defendant IPC Breached Its Contract to Provide Security Services at Ward Parkway Mall, and Plaintiff May Bring an Action for That Breach as a Third Party Beneficiary

In addition to IPC's liability in tort, there is also no question that IPC breached its contract with General Growth to provide security at the Ward Parkway Mall. Plaintiff therefore asserted a separate claim against IPC for that breach of contract. (LF 1639-44). "To state a cause of action for breach of contract, a plaintiff must allege the following: (1) the existence of an enforceable contract between the parties; (2) mutual obligations arising under the terms of the contract; (3) defendant did not perform; and (4) plaintiff was thereby damaged from the breach." Rice v. West End Motors Co., 905 S.W.2d 541, 542 (Mo. App. E.D. 1995); accord Trotter's Corp. v. Ringleader Restaurants, Inc., 929 S.W.2d 935, 941 (Mo. App. E.D. 1996); Slone v. Purina Mills, Inc., 927 S.W.2d 358, 367 (Mo. App. W.D. 1996). Here there is no dispute that IPC entered into an agreement with General Growth, the Mall's management company, to provide security services at the Ward Parkway Mall, and that mutual obligations arose from that contract. A copy of the contract is contained in the Legal File at LF 1657-67. For the purposes of this appeal, there is also no dispute that plaintiff has produced sufficient evidence of IPC's failure to perform under that contract (resulting in her rape) to submit her case to the jury. Rather, the sole issue here is whether

plaintiff is a third party beneficiary who can maintain her own cause of action for IPC's breach of its agreement with General Growth.[18]

"Third party beneficiary is the nomenclature given to one who is not privy to a contract nor to its consideration, but to whom the law gives the right to maintain a claim for breach of contract." Halamicek Bros., Inc. v. R&E Asphalt Service, Inc., 737 S.W.2d 193, 195 (Mo. App. E.D. 1987). "The question of intent is paramount in any analysis of an alleged third party beneficiary situation." Wood v. Centermark Properties, Inc., 984 S.W.2d 517, 526 (Mo. App. E.D. 1998); accord Mitchell v. K.C. Stadium Concessions, Inc., 865 S.W.2d 779, 786 (Mo. App. W.D. 1993); Laclede Investment Corp. v. Kaiser, 596 S.W.2d 36, 41 (Mo. App. E.D. 1980). In general, "[o]nly those third parties for whose primary benefit the contracting parties intended to make the contract may sue on the contract." Mitchell, 865 S.W.2d at 786; accord McKenzie v. Columbian Nat. Title Ins. Co., 931 S.W.2d 843, 845 (Mo. App. W.D. 1996); OFW v. City of Columbia, 893 S.W.2d 876, 879 (Mo. App. W.D. 1995). "Although the third party beneficiary need not be named in the contract, the contract terms must clearly express an intent either to benefit that party or an identifiable class of which the party is a member." Volume Services, Inc. v. C.F. Murphy & Assoc., 656 S.W.2d 785, 794-95 (Mo. App. W.D. 1983); accord Terre du Lac Association, Inc. v. Terre

[18] Plaintiff's Third Amended Petition specifically alleged that she is a third party beneficiary to the security contract between IPC and General Growth. (LF 1633).

du Lac, Inc., 737 S.W.2d 206, 213 (Mo. App. E.D. 1987); Laclede Investment Corp., 596 S.W.2d at 42.

The intent of the parties is evaluated using the classification of beneficiaries found in Restatement of Contracts Section 133. Terre Du Lac, 737 S.W.2d at 213; Laclede Investment Corp., 596 S.W.2d at 41; State ex rel. McHarevo Development Corp. v. Lasky, 569 S.W.2d 273, 275 (Mo. App. 1978). Under this system there are three types of beneficiaries – donee beneficiaries, creditor beneficiaries and incidental beneficiaries.

> A person is a donee beneficiary if the purpose of the promisee in obtaining the promise of all or part of the performance thereof is "to make a gift to the beneficiary or to confer upon him a right against the promisor to some performance neither due nor supposed or asserted to be due from the promisee to the beneficiary." Section 133(1)(a). The person is a creditor beneficiary if the "performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary." Section 133(1)(b). Finally, a person is an incidental beneficiary if he is neither a donee nor a creditor beneficiary. Section 133(1)(c).

Terre Du Lac, 737 S.W.2d at 213 (quoting Restatement of Contracts Section 133); accord Laclede Investment Corp., 596 S.W.2d at 42 n.5; McHarevo Development Corp., 569 S.W.2d at 275. The first two classes of beneficiaries may recover; the third class may not. OFW Corp., 893 S.W.2d at 878; Halamicek Bros., 737 S.W.2d at 195.

Applying these standards here, there is no doubt that plaintiff has produced sufficient evidence to show that she and other Mall patrons are either creditor or donee beneficiaries to the security contract between General Growth and IPC, and she may accordingly maintain a cause of action against IPC for its breach of that contract. As discussed above, "[a] person is a creditor beneficiary if performance of the promise will satisfy an actual, supposed, or asserted duty of the promisee to the beneficiary." Wood, 984 S.W.2d at 527 (emphasis supplied); accord Kansas City N.O. Nelson Co. v. Mid-Western Constr. Co., 782 S.W.2d 672, 677 (Mo. App. W.D. 1989); Chmieleski v. City Products Corp., 660 S.W.2d 275, 289 (Mo. App. W.D 1983); Hardware Center, Inc. v. Parkedge Corp., 618 S.W.2d 689, 693 (Mo. App. E.D. 1981). For the reasons discussed at pp. 36-68 of this brief, the owners and managers of the Ward Parkway Mall had an actual duty to provide protection for their patrons against criminal attacks, based upon the pattern of violent crime at the Mall. Even if this Court were to disagree and hold that defendants had no actual duty, however, it is undisputed that General Growth thought it had such a duty at the time it contracted with IPC for security services:[19]

[19] To ascertain the intent of the parties, "it is often necessary to consider not only the contract between the parties, but 'subsidiary agreements, the relationship of the parties, the subject matter of the contract, the facts and circumstances surrounding the execution of the contract, the practical construction the parties themselves have placed on the contract by their acts and deeds, and other external circumstances that cast light on the intent of the

Q: Do you believe that Ward Parkway Mall has a duty to protect its customers from criminal activity?

A: I believe the owner of the property has a duty, yes.

Q: And as the manager of the property, General Growth would have such a duty in your opinion, correct?

A: Yes.

Q: And that duty would apply to the type of crimes we're talking about -- assault, sexual assault, rape -- correct?

A: Correct.

Levenberg Depo. at 42:5-22 (LF 737) (objections omitted). And it was because of this belief that General Growth hired IPC – for the express purpose of discharging its actual or supposed duty to provide reasonable security:

Q: Is it your position, sir, that Ward Parkway Mall wanted to protect its patrons and customers from being raped while they were at the mall?

A: Yes. We wouldn't want our customers to be raped while they're at the mall.

Q: I'm not only asking you if you would want that to happen. I'm asking you if it's your position that General

---

parties.'" Butler v. Mitchell-Hugeback, Inc., 895 S.W.2d 15, 21 (Mo. banc 1995) (quoting Royal Banks of Missouri v. Fridkin, 819 S.W.2d 359, 362 (Mo. banc 1991)).

> Growth was attempting to protect customers from the crime of rape through their various security activities that they employed?
>
> A: We're trying to deter that crime from happening, yes. We're trying to deter any crime from happening.
>
> Q: And specifically the crime of rape or sexual assault, correct?
>
> A: Yes. That's a crime.

Daise Depo. at 40:25-41:16 (LF 1524); see also id. at 35:8-10) (LF 1522) ("[o]ne of the purposes … behind having [IPC] security officers was to deter criminal activity"); Levenberg Depo. at 42:1-4 (LF 737) ("one of the crimes that General Growth was attempting to deter from occurring at Ward Parkway Mall was rape"); Coudriet Depo. at 10:6-10 (LF 768) (IPC security guards are "there to protect the customers of the mall"). Thus, because General Growth believed that it was contracting with IPC to discharge a duty it owed to Mall patrons, such as plaintiff, such patrons were intended to be third party beneficiaries to that contract and may bring an action for IPC's breach.[20]

[20] The distinction between being a creditor or a donee beneficiary makes little difference in this case. Plaintiff has presented substantial evidence showing that General Growth intended for IPC to protect customers, including plaintiff, at the Ward Parkway Mall. If General Growth did so because it feared breaching its duty to the public, then plaintiff is a creditor beneficiary. If it did so gratuitously to attract customers to the Ward Parkway

The contract language itself confirms this interpretation. The contract by its terms makes IPC responsible "to provide security services" at the Ward Parkway Mall. Security Agreement at I.1 (LF 1657). The contract specifically states that IPC and its guards should protect "mall customers . . . from risk of serious injury" by making arrests as necessary. Id. at I.3.H (LF 1572). The contract spells out in detail the duties and responsibilities of IPC, all of which are clearly intended to provide protection to Mall patrons. Id. at I.3.A-K, I.6, VI.5 (LF 1571-72, 1575, 1580). The contract contains no provision excluding claims of liability by third party beneficiaries. Rather, it specifically contemplates such suits by requiring IPC to indemnify the other defendants for claims arising from its "negligent, grossly negligent, intentional or willful act[s] or omission[s]" in providing security services. Id. at I.5.E (LF 1575). IPC is also required to maintain adequate insurance for claims based on its failure to provide security services. Id. What "negligent omission" could IPC make that would give rise to liability against the other defendants, if not a failure to provide proper security? All of these provisions show that the parties' primary (if not sole) purpose in making the contract was to benefit the Mall's patrons, a class that included plaintiff.

Other documents incorporated by reference into the contract go even further in illustrating the parties' intent. For example, IPC is required to provide its security services in conformance with the requirements of a "Policies and Procedures Manual." Id. at I.3.J

Mall, then plaintiff is a donee beneficiary. Either way she is entitled to maintain her action against IPC.

(LF 1573); see also id. at I.3.D and II.1.A (LF 1572, 1577). This Manual offers a telling description of the parties' purpose in making the contract:

> The ultimate goal of any successful shopping center Owner, Developer or Manager is the continued patronage of customers to the mall. In each Center, Mall Management endeavors to create a safe, orderly atmosphere in which customers may relax and shop without undue concern for their own safety. In order to sustain and insure this possible atmosphere, the management of [Ward Parkway Mall] has retained the services of IPC International Corporation to provide Mall Public Safety Services.

Mall Public Safety Services Policies and Procedures Manual at I. (LF 1736). The security contract also requires that all IPC personnel be trained according to a specified program. Security Agreement at IV.1-3 (LF 1664). The training guide from this program further explains the reason why the parties entered into that contract:

> Our clients are most concerned with the well being of visitors, customers and employees of the shopping center. It is for this reason that Public Safety Personnel are present. Our client understands their responsibility to the public to provide a safe, orderly environment for shoppers and employees alike.

(LF 1739). The training guide then goes on to warn IPC personnel of the risk of sexual assaults at the Mall, and discusses how such assaults can be prevented. (LF 1738). Again,

this evidence demonstrates convincingly that the purpose behind the security contract was to protect Mall patrons such as plaintiff. Nothing more needs to be shown for her to prevail.

The only two Missouri cases to consider the issue have specifically held that shoppers and business invitees may be third party beneficiaries to a landowner's contract with a security company. Miller v. SSI Global Security Service, 892 S.W.2d 732, 734 (Mo. App. E.D. 1994); Brown v. National Super Markets, Inc., 679 S.W.2d 307, 309-10 (Mo. App. E.D. 1984). Although it appears that the Missouri courts have never been faced with the exact situation here, where a security company expressly undertook to provide security services at a shopping mall but then failed to live up to that agreement, there is ample authority in other jurisdictions for imposing liability under such circumstances.

A situation nearly identical to the present case was presented in McCullion v. Ohio Valley Mall Co., 2000 WL 179368 (Ohio Ct. App. Feb. 10, 2000) (attached at Tab 4). In McCullion, as here, a woman who had been assaulted filed a breach of contract claim against the security company which had promised to provide adequate security for a public area, but failed to do so. Id. at *1, *3. And there, as here, the security company argued that the woman could not recover because she was a mere incidental beneficiary to its contract with the landowner. Id. at *2. The Ohio Court of Appeals squarely rejected that argument. The court cited provisions of the contract specifying that the company would provide security services for the "Plaza" area where the attack took place, for the benefit of both persons and property, according to certain specified terms. Id. at *3. From those contract terms, the court found that the parties had contemplated that the security company would protect persons visiting the Plaza, and was therefore liable to such persons for its breach of

the agreement. Id. at *4. The purpose of the contract was to protect patrons, and a duty to do so was created thereby. The same contract terms relied upon by the McCullion court are contained in the agreement at issue here, and by the same reasoning IPC is liable to plaintiff for its failure to provide the security services it had promised.

The same result has also been reached in other jurisdictions. For example, in Elizabeth E. v. ADT Security Systems West, Inc., 839 P.2d 1308, 1311 (Nev. 1992), the plaintiff was declared to be a third party beneficiary to her employers' contract with a security company because that company knew its security system "would be used, if at all, by employees" such as the plaintiff. Here IPC knew that its security services would be used by Mall patrons such as plaintiff. Indeed, IPC held its guards open to the public, should there be a need or request for services. Security Agreement at I.E (LF 1661). Similarly, the court in Galloway v. Bankers Trust Co., 420 N.W.2d 437, 440-41 (Iowa 1988), imposed liability under a third party beneficiary theory on a security company hired to patrol a shopping mall, on the ground that its contract required it to patrol for the purpose of protecting "[p]roperty assets, tenants and customers."[21] The same is true here. And in Cooper v. IBI Sec. Serv. of Florida, Inc., 281 So.2d 524, 525-26 (Fla. Ct. App. 1973), a security company hired to protect a company's employees was held liable (again under a third party beneficiary theory) to one of those employees when he was robbed and shot. The

[21] This Court cited Galloway with approval in its leading case of Madden v. C & K Barbecue Carryout, Inc., 758 S.W.2d 59, 62 n.1 (Mo. banc 1988).

court emphasized that "[i]t was the purpose and object of the contract to obviate or protect the plaintiff from exactly that which occurred when he went unprotected," and "[s]ince the plaintiff was one of the persons for whose benefit the protection contract was made, he had standing thereunder as a third party beneficiary." Id. at 526. Again, the purpose and object of the contract here was to protect Mall patrons such as plaintiff, and she therefore has standing to bring a claim against IPC for its breach of that contract.

McCullion, Elizabeth E, Galloway and Cooper all stand for the proposition that when a security company contracts to provide security for an area open to the public, it necessarily must know that the purpose and object of that contract is to benefit the members of the public visiting that location. If IPC wishes to claim to the contrary – if it wishes to claim that neither it nor General Growth ever intended to benefit patrons at the Ward Parkway Mall with their contract – then it must answer the questions posed by the court in Holley v. St. Paul Fire & Marine Ins. Co., 396 So.2d 75 (Ala. 1981). In Holley the plaintiff, while visiting a hospital, injured herself because of inadequate lighting. Id. at 76. She sued under a third party beneficiary theory, alleging that the hospital had a contract with the defendant to maintain the hospital, which the defendant breached. Id. at 76-77. The Alabama Supreme Court, in upholding the plaintiff's right to bring such an action, offered the following common sense analysis:

> Can there be any doubt that the hospital board does not make a maintenance contract for the direct benefit of the board members themselves? For whom does the board maintain the hospital? Obviously for those who will inhabit it for purposes

> of treatment, rehabilitation and cure. We may take judicial knowledge that visitors are not discouraged from using hospital facilities but, in fact, have physical hospital facilities provided for them. Thus they are expected to play a role in the scheme of patient hospitalization. Hospital maintenance, therefore, is necessary for their presence as it is for other expected occupants of hospital facilities, and the parties to a contract providing such maintenance intend visitors to derive a direct benefit from the rendition of those services.

Id. at 80. The same can be said here. General Growth obviously did not contract for security services to protect the lives of its board members or shareholders. Likewise, IPC was obviously not seeking to protect its board members in Illinois by way of the security contract. For whose benefit, then, were the security services provided? Obviously for the benefit of persons visiting the Mall, i.e., patrons such as plaintiff. Any claim otherwise simply defies common sense.

In its briefing before the Circuit Court, IPC offered no evidence to support its claim regarding the intent of the parties. IPC did not address either the explicit language of its contract or the other evidence showing that the parties intended for IPC to protect Mall patrons. Instead, IPC simply relied uncritically on Wood v. Centermark Properties, Inc., 984 S.W.2d 517 (Mo. App. E.D. 1998). That case, however, did not involve a security company at all. Rather, it involved a lease agreement between the landowner and one of its store-tenants, which required in part that the tenant pay a "community area charge" used to defray

the cost of generally maintaining and managing the property, including providing security. Id. at 527. The Wood court simply held that the plaintiff had produced no evidence that the parties to that general lease agreement had intended to benefit mall patrons. Id. The court said nothing about the duties of any security company.

The logic of Wood cannot be stretched to apply here. It is reasonable to assume that a landlord and store-tenant, when negotiating a commercial lease and haggling over the amount of rent, do not have the public in mind. The same cannot be said about a contract specifically made for the provision of security services. Unlike the landowner in Wood, IPC was hired for the specific purpose of providing security services to protect patrons of the Ward Parkway Mall. IPC did not assume that duty gratuitously – it was paid a substantial amount of money to do so. And now, having accepted that money, it seeks to avoid responsibility for its own failure to perform. Denying liability here would allow IPC to receive all of the benefits and shoulder none of the burdens of its contract. Holding IPC accountable for its actions, by contrast, will ensure that IPC and other similar security companies perform their contractual obligations properly in the future.

Conclusion

All sides agree that the rape of a twelve-year-old girl is a tragedy. But an even greater tragedy is how easily that rape could have been prevented. If only defendants' guards had responded to the calls for help; if only defendants had fixed the lights on the Catwalk, as their own security audit recommended; if only the Eagle Two position had been manned, as it was supposed to be; or if only defendants had dealt with the known crime problem on the Catwalk by installing a door alarm or closed circuit television. And the

greatest tragedy of all is that similar violent crimes will needlessly continue to occur at the Mall. Defendants freely admit they have done nothing to improve their woefully inadequate security, and it is unlikely they ever will unless and until they are held accountable. The Ward Parkway Mall will continue to produce nearly two violent crime victims every month until changes are made and security is improved. This Court cannot restore plaintiff's lost innocence, but it can act to prevent similar tragedies in the future. For these reasons and for all the reasons discussed herein, the Circuit Court's grant of summary judgment and judgment on the pleadings in favor of the defendants should be reversed, and this case should be remanded for trial on the merits.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Supreme Court Rule 84.06(c) and (g), the undersigned hereby certifies the following:

1. This brief complies with the limitations contained in Rule 84.06(b);

2. This brief was prepared using Microsoft Word 2000. According to the word count feature used in that program, this brief contains 25,417 words.

3. A copy of this brief is being submitted on a 3 1/2–inch floppy disk. This disk has been scanned for viruses using the program Norton AntiVirus 2000. The disk is virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that on September _____, 2001, two copies of the foregoing were mailed, via U.S. mail, postage prepaid, to the following:

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